# PROTECTION THROUGH THE LAW

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by Philip Francis

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by PHILIP FRANCIS

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# INTRODUCTION AND OVERVIEW

The object and function of laws is the protection of legal rights. But the correlative of right is *duty*. Where a duty exists between citizens, defined by the general law, and that duty is breached, a civil cause of action arises.

The name given to such a breach of duty is *tort*, a French word, meaning "wrong," which many centuries ago came into the English legal lexicon to define that whole area of the law which has to do with the *redress of civil wrongs*, i.e. those acts committed in breach of a duty which one man owes to another. The object of the *law of torts* may be said to be the protection of each individual in the community from aggressions by his fellow men in respect to his person, his reputation and his property. The redress provided is usually, but not always, by compensation in money.

Actually, the law of torts is perhaps more with us in our daily lives than almost any other field of the law. The dented fender we sustain in our automobile; the duty we owe to a repairman who comes on our premises; the duty we owe to the neighbor's youngster who cuts, uninvited across the lawn; our right to damages when the plumber negligently repairs a pipe and water pours over the basement. There is hardly an undertaking in our lives where we are not immediately involved in a *right* owed to us and a *duty* that we owe to others.

And the law of torts follows us as well into the business world. Here, where we customarily think in terms of contracts, the law of torts is no less with us—often operating almost complementarily with the law of contracts. Our right, for example, to dispose of a chattel which we have purchased on the installment plan before the full price has

been paid; or the reliance which we place on the statements of a seller as to the nature, quality and value of his product; the burden of loss where a negotiable instrument falls into the wrong hands—these are all as much aspects of the law of torts as they may be the indirect consequences of contracts.

Then, too, there is the area of our personal rights. Our right not to be defamed—and the duty we have not to libel or slander another. How far may we go in the spirit of competition in interfering with a contract which a competitor may have with an account, or in spiriting away a desirable employee? What protections exist against assault, battery, false imprisonment and malicious prosecution? Is there a right of privacy, and who is entitled to its enjoyment?

The Constitution has laid the basis for our *civil rights* which generally involves our protection against both government and our fellowman in the exercise of our constitutionally guaranteed liberties. The common law, refined, modified and amplified by statute, sets out the area of *civil wrongs*, those actions taken by one person to the detriment of others, in violation of the *duty* which the law establishes.

Against this background, the chapters which follow will treat of the various types of actionable conduct which are encompassed by the law of torts. *Negligent actions* (chapter III), as a result of which injury is done to another, are perhaps the most common, and they are analyzed against the background of such legal doctrines as "proximate cause," "contributory negligence," "assumption of risk," and the like, all of which are technical names for eminently logical rules regulating and determining liability among individuals.

*Trespass to person and property* (chapter IV) covers the physical invasions of others and the legal consequences thereof, while *Nuisance* (chapter V) is discussed in terms of interference with the enjoyment of one's property through invasions other than those of a physical nature.

*Wrongful taking*, legally referred to as conversion, (chapter II) reviews the law where plaintiff and defendant con-

test with each other the title to personal property, with its implications for the right to dispose of such property, and the rights, as well, of third party innocent purchasers.

*Fraud and Deceit* (chapter VI) represent a different type of wrongful taking, where the act which creates the injury is done by the plaintiff on the inducement or representation of the defendant. And because this particular area constitutes a bridge between tort and contract, additional consideration is given to the field of *quasi-contract* (chapter VII), where contract relationships between parties are remade or reformed based on the contract implications of fraud, misrepresentation and mistake.

*Violations of personal rights* (chapter I)—defamation, malicious prosecution, interference with business, contractual and domestic relations, and interference with the right of privacy—underscore that injury can be done to a man not only in his person or his property, but in his reputation and in the enjoyment of his individual identity.

*Products Liability* (chapter IX)—This is a new chapter dealing with the ever increasing interest in products liability law, a compelling outgrowth of the present "consumerism" which prevails today. The tort liability of manufacturers is treated in this chapter. The appendix includes the warranty provision of the important Magnuson-Moss Warranty Act which Congress passed in 1975 and which is directly related to this legal problem.

Because the law of torts, unlike so many other areas of law, virtually presumes an adversary court proceeding in which a plaintiff complains of injury and damage caused to him by the defendant, *measure of damages* is discussed in chapter IX, and the Appendices have been planned to state the essential allegations required in complaints in all of the major tort actions, and to include actual forms of complaints. While needless to say, such information can never substitute for the skill of an attorney, it may prove helpful to the layman in situations where he has been injured, in evaluating just where his rights may lie, enabling him to be more helpful in relating the situation to his attorney, and in understanding the actions which may then ensue.

# Chapter I
# VIOLATIONS OF PERSONAL RIGHTS

## Defamation—Libel and Slander

Legal responsibility for defamation is not a question of malice, or of intent, but simply whether the act of publishing the defamatory statement is in legal effect the act of the defendant. Thus, a newspaper which inadvertently published the name of a firm among a list of bankrupts, when it was to have been carried in a list of partnerships dissolved, was guilty of defamation notwithstanding there was neither malice, nor intent, nor perhaps even negligence.

Historically, defamation has been divided into oral defamation generally referred to as *slander*, and written defamation referred to as *libel*. Because their historical developments were quite dissimilar, however, they are not really one and the same thing, called by a different name. Traditionally, the test of slander has been more rigid than the test of libel, although the more recent view is to characterize both as defamation and to eliminate the ancient distinctions.

SLANDER: Oral slander, as a cause of action may be divided into five classes: (1) words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished; (2) words falsely spoken of a person which impute that the party is infected by some contagious disease, where, if the charge is true, it would exclude the party from society; (3) defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment for profit, or the want of integrity in the discharge of the duties of such an office or employment; (4) defamatory words falsely spoken of a party which prejudice

such party in his or her profession or trade; (5) defamatory words falsely spoken of a person which, though not in themselves actionable, occasion the party special damage.

It is this fifth category which specifically sets off slander from libel by requiring a showing of special damages. Thus, for example, if a woman were charged with immoral conduct, unless the charge were in writing, it would be actionable *only if she could prove special damage.* "Unwritten words," wrote one judge, "even if they impute immoral conduct to the party, are not actionable in themselves, unless the misconduct imputed amounts to a criminal offense for which the party may be indicted or punished."

LIBEL: These ancient limitations on slander are not applicable where libel—the written defamation—is involved. For, in addition to the four essential tests of slander listed above, libel exists when the words "contain that sort of imputation which is calculated to villify a man and bring him into *hatred, contempt and ridicule.*" Actually while the test is stated as joint, any one will suffice to support a libel action.

The limits of libel may, therefore, be drawn as follows: the publication by writing, print, picture, effigy or similar means, of a false statement which concerns another, and conveys an imputation upon him, calculated to bring him into hatred, contempt or ridicule, or to damage him in his trade, business, profession or official position.

PLEADING DEFAMATION: To make out a sufficient cause of action for libel, a plaintiff must show (1) a publication (written) by the defendant (2) of a defamatory statement (3) concerning the plaintiff. In slander, there is a fourth essential—(4) actual damage proximately resulting to the plaintiff.

Where the defamation appears on its face, the plaintiff establishes his case by simply stating what was published. The burden is then on the defendant to show that, in fact, the circumstances of publication render a defamatory interpretation impossible. Thus, a customer who says to a merchant, on being advised of the price of an article, "You are a highway robber!", while having uttered a statement def-

amatory on its face, can plead in defense that those within hearing range of the statement would well understand that this was simply an expression of anger or irritation at the price and not defamatory.

On the other hand, there is the possibility of a latent defamation, i.e. the words themselves do not suggest that the party has been defamed, but the context is such that in fact a defamation has been committed. In this instance, the burden is on the plaintiff to show that the seemingly innocent publication is in fact defamatory. An example would be the utterance in an ironic tone of a seemingly praiseworthy remark, to wit "Judge Brown—an honest lawyer!"

As to who may bring an action for defamation, generally speaking, an individual or corporation may do so, but class or group defamation, although permitted under European law, is not favored under common law. There have been some instances of "group libel" statutes, but these, usually applied in the context of defamation of racial or religious groups, are of doubtful constitutionality and of even more doubtful effectiveness.

It is important to note that the material element of a cause of action for defamation is not the speaking or writing of the words, *but their publication.* It is the passing of the defamation on to some third or more parties that is the crux of the act of defamation. There must be communication by the speaker or writer to at least one third person.

To be actionable the statement must be false, and truth is at all times a defense to a defamatory action. However, intent to defame, as previously noted, is not a material element. Malice traditionally has been regarded as an element of libel and slander, but because there may be defamation without malice, the courts have either disregarded this requirement or implied malice from the defamation itself.

DEFENSE AGAINST DEFAMATION: As indicated above, *truth* is a defense to an action for libel or slander. Alleging truth as a defense is not a direct denial of the defamation, but a collateral matter which, if established by the defendant, will bar the plaintiff's recovery. The defendant, therefore, bears the burden of proof.

Neither the defense that the defendant merely repeated what someone else told him nor that the defendant disbelieved the truth of what was told him and which he subsequently published will be sustained. The injury to the reputation of the slandered person is not repaired by the fact that the words were uttered for the purpose of taking counsel.

*Privilege* is frequently pleaded as a defense to an action for defamation. Absolute privilege exists where the defamation is part of court or other public proceedings of record. Conditionally privileged communications will defeat an action for defamation, but here motive will be the determining factor in whether the defense of privilege will be sustained. The following are some of the situations in which the conditional privilege exists:

(1) Where the defamatory statement is made in the discharge of some public or private duty, there is no liability in the absence of proof of actual malice. Thus, an employer's answer to a question regarding the character of a former employee made by a person proposing to hire that individual is conditionally privileged.

(2) Statements in the protection of an interest are conditionally privileged, where reasonably necessary for such protection. Thus, in the example above, an employer who warned his employees of a former employee suspected of theft could be said to be acting from the standpoint of protecting his own business interests.

(3) Newspaper repetition of public proceedings is conditionally privileged, while the record itself of such proceedings would be absolutely privileged.

*Fair comment* is a defense to defamation, much of the same nature as privilege. In general, an individual who places himself in the public domain—from politician to writer to actor and similarly placed persons—invites the possibility of criticism.

But fair comment deals only with such things as invite public attention or call for public comment. It does not follow a public man into his private life or pry into his

domestic concerns. It never attacks the individual, but only his work.

Whether the comment is in fact "fair" becomes a matter for a jury determination.

### Malicious Prosecution

To maintain an action for malicious prosecution, a plaintiff must show: (1) institution of the prosecution by the defendant; (2) determination in plaintiff's favor; (3) want of probable cause for the prosecution; (4) malice; (5) damages.

While the dropping of a case for failure to prosecute will be regarded as a favorable determination in the plaintiff's favor, a termination of prosecution brought about by compromise and settlement will bar an action for malicious prosecution. And where probable cause for the prosecution exists, the malice or bad motives of the defendant will not entitle the plaintiff to a judgment. While a jury may be permitted to infer bad motive from lack of probable cause, they are not permitted to infer lack of probable cause because bad motive is shown.

Malicious prosecution is limited however to the instigation of criminal actions. Where a succession of civil suits has been brought against an individual, even in the absence of probable cause for the suits, the injured party cannot sue for malicious prosecution, although there is a growing body of authority that there should be some basis for compensation in damages to such injured party. Where, however, the proceedings are administrative rather than judicial in character, there is no remedy at all.

Malicious prosecution is frequently confused with false imprisonment. In false imprisonment, there is a trespass on the person or property of the injured party. Malicious prosecution, on the other hand, is based on the unfounded putting into operation of the machinery of law.

### Interference with Domestic, Contractual and Business Relations

Earliest common law recognized the right to undisturbed

enjoyment of domestic relations, and gave redress for invasions of such right. Within the category covered were conjugal rights, parental rights and the right of the master to free enjoyment of the service of his servant.

A husband has the right to non-interference in marital relations, and may bring an action for damages for the loss of the conjugal fellowship of his wife. The wife, while relatively unprotected under English law, may recover in the United States for loss by reason of alienation of affection or criminal conversation.

Utilizing the theory of loss of services, the courts have permitted a parent to recover for injuries to a child ranging from negligent injury to abduction and seduction. While the theory is somewhat rigid, the concept of parental recovery appears to be valid.

In the master-servant area, it has been law for centuries that a third person who wilfully and knowingly entices a servant from his employment is liable in damages to the employer.

An 1853 English case laid down the law followed in this country as well that it is a violation of legal right to interfere with valid contractual relations. Under this doctrine an employer whose employees have been induced by a third person to break their contract of employment may maintain an action against such third person. Similarly, an employee has a right of action against a third person who maliciously procures his discharge or the breach of his contract of employment.

Not merely employment contracts, but a wide variety of contracts have been held to come under the stated rule. The following are typical: contract to supply building material; contract for construction of a railroad; contract with a common carrier; contract by the state for purchase of school books; contract for the sale of goods; contract for construction of a machine; lease of real property; contract of advertisers with newspapers.

Interference with trade or business has been frequently justified on the grounds of competition. The extent to which such justification will prevail is basic to the law of unfair

competition which is not within the purview of this volume. In similar vein, interference with employment in the nature of strikes, picketing and boycott are essentials of modern labor law, and are not covered in this volume.

Two related actions which appear to lie closer to the area of interference with trade or business, rather than libel and slander, are *slander of title* and *disparagement of goods,* both of which are strictly interpreted by the courts. Clearly, however, the puff that "my product is better than all others," will not subject the puffer to an action for disparagement of a competitor's goods—although if the puff goes too far, he may find himself confronted with the Federal Trade Commission.

**Right of Privacy**

Modern day judicial precedent recognizes that a person is entitled to protection from public curiosity. Unauthorized publication of pictures or articles discussing individual affairs is generally actionable, although there is an exception in the case of people in whom the public has an interest, such as public officials, actors, artists, criminals and famous or notorious persons. This exception is similar to the privilege of fair comment in libel cases. Furthermore, the protection being from unwanted publicity, the fact that the picture is accurate or the statement true is no defense.

Within the last several years, the entire concept of legal protection of privacy has been enlarged. The whole area of confidential relationships—doctor-patient, lawyer-client—is involved, as are confidential disclosures to government, eavesdropping, wiretapping, and the like. The entire field has been analyzed from the practical, legal and constitutional viewpoint by Hyman Gross in *Legal Protection of Privacy* (Legal Almanac Series #55, Oceana, 1964). Gross moves away from the traditional theory that views one's privacy as a "property" and advances privacy as a "personal right."

**A Gray Area Situation**

The interrelationship of various tort actions emerges from

the following case history which reflects an actual situation.

X made a purchase at the local department store for $15. The purchase was on a charge and on submission of the account, he paid $12.50. There subsequentaly ensued a to-do between X and the store over the remaining $2.50, with the result that the store sent to X's employer a "Final Notice Before Suit," urging the employer to intervene to get X to pay—not the $2.50 still owing, but the entire $15. X was properly indignant at this involvement of his employer, and particularly on the basis of the incorrect amount.

His lawyer sued the store, demanding damages for shame and humiliation, as well as invasion of X's privacy, i.e. "no creditor has the right to dun a debtor's employer." The store sought to set the matter in the context of an action akin to garnishment.

In its decision in favor of X, the Court said, "It is manifest to us . . . that the issuance of the letter and enclosure (notice)–for the obvious purpose and design of forcing payment by the debtor—constituted a tort. The debtor is entitled to redress even though he was unable to prove actual money damages.

"And it makes no difference whether the letter is considered libelous or not. It is well settled that damages will be allowed for mental anguish suffered by a debtor in cases where the creditor has pursued unreasonable methods in attempting to make collection of his claim."

This decision does not remove from the creditor the right merely to notify an employer that an employee owes a debt, so long as there is no undue coercion. But if the creditor goes further than simple notification, he lays himself open to suit—either on the basis of libel, or intentional infliction of mental suffering, or invasion of privacy, or perhaps even interference in the contractual relationship between employer and employee.

Because creditors have conceived a variety of stratagems to collect debts, some devices have wound up before the Federal Trade Commission branded as deceptive business practices. Only recently, two major publishing houses

agreed with the FTC to cease and desist from using a fictitious collection agency, which had been writing dunning letters for them.

As for garnishment of wages, that's a step to be taken *after* judgment is rendered in court, not before.