Excerpts From Majority

Here are excerpts from opinions in the Supreme Court case of Anthony Herbert vs. Columbia Broadcasting System:

By Justice Byron R. White For the 6-to-3 Majority

Civil and criminal liability for defamation was well established in the common law when the First Amendment was adopted, and there is no indication that the Framers intended to abolish such liability..

New York Times and Butts effected major changes in the standards applicable to civil libel actions.Under these cases public officials and public figures who sue for defamation must prove knowing or reckless falsehood in order to establish liability. . . .

These cases rested primarily on the conviction that the common law of libel gave insufficient protection to the First Amendment guarantees of freedom of speech and freedom of press and that to avoid self-censorship it was essential that liability for damages be conditioned to the specified showing of cupable conduct by those who publish damaging falsehood. Given the required proof, however, damages liability for defamation abridges neither freedom of speech nor freedom of the press.

Nor did these cases suggest any First Amendment restrictions on the sources from which the plaintiff could obtain the necessary evidence to prove the critical elements of his cause of action. On the contrary, New York Times . . . made it essential to proving liability that plaintiffs focus on the conduct and state of mind of the defendant. To be liable, the alleged defamer of public officials or of public figures must know or have some reason to suspect that his publication is false. In other cases proof of some kind of fault, negligence perhaps, lessential to recovery. Inevitably, unless liability is to be completely foreclosed, the thoughts and editorial processes of the alleged defamer would be open to examination.

It is also untenable to conclude from our cases that, although proof of the necessary state of mind could be in the form of objective circumstances from which the ultimate fact could be inferred, plaintiffs may not inquire directly from the defendants whether they knew or had reason to suspect that their damaging publication was in error. . . .

It is nevertheless urged by repondents that the balance struck in *New York Times* should now be modified to provide further protections for the press when sued for circulating erroneous information damaging to individual reputation. . . .

We are thus being asked to modify firmly established constitutional doctrine by placing beyond the plaintiff's reach a range of direct evidence relevant to proving knowing or reckless falsehood by the publisher or an alleged libel, elements that are critical

and Dissenting Opinions

to plaintiffs such as Herbert. The case for making this modification is by no means clear and convincing, and we decline to accept it. . . .

. . . [We] are urged by respondents to override these important interests because requiring disclosure of editorial conversations and of a reporter's conclusions about the veracity of the material he has gathered will have an intolerable chilling effect on the editorial process and editoral decision-making. But if the claimed inhibition flows from the fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what the *New York Times* and other cases have held to be consistent with the First Amendment. Spreading false information in and of itself carries no First Amendment credentials. . . .

It is also urged that frank discussion among reporters and editors will be dampened and sound editorial judgment endangered if such exchanges, oral or written, are subject to inquiry by defamation plaintiffs. We do not doubt the direct relationship between consultation and discussion on the one hand and sound decisions on the other; but whether or not there is liability for the injury, the press has an obvious interest in avoiding the infliction of harm by the publication of false information, and it is not unreasonable to expect the media to invoke whatever procedures that may be practicable and useful to that end.

Justice Lewis F. Powell (Concurring)

I wrote to emphasize . . . that, in supervising discovery in a libel suit by a public figure, a district judge has a duty to consider First Amendment interests as well as the private interests of the plaintiffs.

Justice Thurgood Marshall (Dissenting)

Insulating the press from ultimate liability is unlikely to avert self-censorship so long as any plaintiff with a deep pocket and a facially sufficient complaint is afforded unconstrained discovery of the editorial process.

Justice William J. Brennan Jr. (Dissenting)

. . . It is clear that disclosure of the editorial process will increase the likelihood of large damage judgments in libel actions, and will thereby discourage participants in that editorial process.

Justice Potter Stewart (Dissenting)

Justice Potter Stewart (Dissenting)

What was not published has nothing to do with the case. And liability ultimately depends upon the publisher's state of knowledge of the falsity of what he published, not at all upon his motivation in publishing it—not at all in other words, upon actual malice as those words are ordinarily understood.