

## THE “REPUBLICATION PRIVILEGE”

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The ordinary common law rule for republication of a libel is that a person who reprints or circulates a libelous statement is liable for defamation even though the republisher identifies the source of the statement or indicates that he is merely repeating another’s statement. Under New York’s “republication privilege,” however, the republisher of a factual statement may rely on the research of the original publisher, so long as such republisher is not “grossly irresponsible” in doing so.<sup>1</sup> According to the New York Court of Appeals, “a company or concern which simply republishes a work is entitled to place its reliance upon the research of the original publisher, absent a showing that the republisher ‘had, or should have had, substantial reasons to question the accuracy of the articles or the bona fides of (the) reporter.’”<sup>2</sup>

In *Karaduman v. Newsday, Inc.*, the New American Library published a book based on a series of articles that appeared in *Newsday* on the trade in narcotics. Karaduman, a Turkish national named in articles and in the book as a specialist in smuggling along the Black Sea route brought an action for defamation against Newsday, the original reporters and NAL, based on the republication of the allegations in the new book. Although a plurality of the Court of Appeals found that factual issues precluding summary judgment existed as to whether Newsday’s corporate personnel may have been grossly irresponsible in republishing the allegations against Karaduman,<sup>3</sup> the Court

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<sup>1</sup> *Duane Reade Inc. v. Local 338 Retail*, 6 Misc.3d 790, 795, 791 N.Y.S.2d 288, 292 (N.Y.Sup. 2004)(it was “clearly not grossly irresponsible” for a union to “[r]ely... on a long running New York City daily newspaper, as well as on the research of a State Assemblyman” in publishing an item on its website).

<sup>2</sup> *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 550, 435 N.Y.S.2d 556, 565-66 (1980) (quoting *Rinaldi v. Holt, Rinehart & Winston*, 42 N.Y.2d 369, 383, 397 N.Y.S.2d 943, 952 (1977)).

<sup>3</sup> *Id.*, 51 N.Y.2d at 552-53, 435 N.Y.S.2d at 566-68.

unanimously held that no such issues existed with respect to NAL: “To the contrary, in view of the widespread acclaim that ‘The Heroin Trail’ received and the absence of any prior litigation in connection with its first publication, it would appear that NAL was entirely justified in assuming without further inquiry that the series was accurate.”<sup>4</sup> The Court further held that this “qualified privilege” applied to statements about private individuals as well as public officials (such as were involved in *Rinaldi v. Holt, Rinehart & Winston*).<sup>5</sup>

New York’s republication privilege has been applied to republication of news items disseminated by news services.<sup>6</sup> It also has been extended to an Internet website’s republication of a press release accusing plaintiff’s company of selling counterfeit goods by a company that conducts investigations of websites selling counterfeit or unlicensed goods.<sup>7</sup>

In New York, the “republication privilege” is a natural outgrowth of the New York Court of Appeals’ holding in *Chapadeau v. Utica Observer-Dispatch* that, with respect to publications that involve matters of legitimate public interest and concern, notwithstanding that the plaintiff is a private figure, defamation liability requires a showing that the publisher acted in a “grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.”<sup>8</sup> Nonetheless, although most republished matters will

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<sup>4</sup> *Id.*, 51 N.Y.2d at 550, 435 N.Y.S.2d at 566.

<sup>5</sup> *Id.*, 51 N.Y.2d at 550-51, 435 N.Y.S.2d at 566.

<sup>6</sup> *See Rust Comm. Group, Inc. v. 70 State St. Travel Serv., Ltd.*, 122 A.D.2d 584, 504 N.Y.S.2d 927 (4<sup>th</sup> Dep’t 1986) (radio station’s report, based on item that had appeared in a local newspaper and on the UPI wire service, that plaintiffs were wanted in several states for cheating customers); *Zetes v. Richman*, 86 A.D.2d 746, 447 N.Y.S.2d 778 (4<sup>th</sup> Dep’t 1982) (small newspaper’s republication of story obtained from UPI that plaintiff was selling poor-quality coins).

<sup>7</sup> *Tzougrakis v. Cyveillance, Inc.*, 145 F.Supp.2d 325, 331-32 (S.D.N.Y. 2001).

<sup>8</sup> *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 199, 379 N.Y.S.2d 61, 64 (1975).

be matters of public interest and concern to which the *Chapadeau* standard of “gross irresponsibility” would in any event apply, without the “republication privilege,” that standard would not otherwise apply in New York to republished matters that involve private figures and private matters.

Numerous other jurisdictions have expressly recognized something like New York’s republication privilege, at least with respect to wire service reports but sometimes also with respect to reports from other publications. Depending on the applicable framework in the particular case (e.g., negligence, malice, or “actual malice”), with slight variations, such jurisdictions hold, as in New York, that a republisher is not negligent (or malicious, wanton, careless or in reckless disregard, whichever standard is applicable, given the status of the plaintiff and the particular state law) as a matter of law when it republishes without further investigation a wire service article (or, sometimes, a local news article) that does not suggest a factual error, an apparent inconsistency, or the need for further investigation, or that does not appear inherently improbable.

At least 18 jurisdictions have expressly (or *a fortiori*) recognized such a defense with respect to republication of wire service articles.<sup>9</sup> Moreover, in decisions arising

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<sup>9</sup> In addition to New York, these include Alabama (*Ripps v. Gannett Co.*, No. CV 91-B-1954-S, 1993 WL 209617, at \*6 (N.D. Ala. Mar. 3, 1993), *aff’d*, 24 F.3d 254 (11th Cir. 1994)); Alaska (*Gay v. Williams*, 486 F. Supp. 12, 16-17 (D. Alaska 1979)); Arizona (*Matter of Medical Lab. Mgt. Consultants*, 931 F. Supp. 1487, 1492 (D. Ariz. 1996)); District of Columbia (*Waskow v. Associated Press*, 149 U.S. App. D.C. 278, 281, 462 F.2d 1173, 1176 (D.C. Cir. 1972)); Florida (*Layne v. Tribune Co.*, 108 Fla. 177, 190, 146 So. 234, 239 (1993)); Georgia (*Brown v. Courier Herald Pub. Co.*, 700 F. Supp. 534, 537-38 (S.D. Ga. 1988)); Hawaii (*Mehau v. Gannett Pacific Corp.*, 66 Haw. 133, 148-49, 658 P.2d 312, 322-23 (1983)); Illinois (*Kapetanovic v. Stephen J. Productions, Inc.*, No. 97 C 2224, 2002 WL 475193, at \*7 (N.D. Ill. Mar. 27, 2002)); Kentucky (*O’Brien v. Williamson Daily News*, 735 F. Supp. 218, 220 (E.D. Ky. 1990), *aff’d*, 931 F.2d 893 (6th Cir. 1991)); Massachusetts (*Appleby v. Daily Hampshire Gazette*, 395 Mass. 32, 38, 478 N.E.2d 721, 725 (1985)); Michigan (*Howe v. Detroit Free Press*, 219 Mich. App. 150, 154, 555 N.W.2d 738, 740 (1996), *aff’d*, 457 Mich. 871, 586 N.W.2d 85 (1998)); Minnesota (*Cole v. Star Tribune*, 581 N.W.2d 364, 368 (Minn. Ct. App. 1998)); Missouri (at least with respect to events occurring “many miles away,” *Walker v. Pulitzer Publishing Co.*, 271 F. Supp. 364, 365 (D. Mo. 1967), *aff’d*, 394 F.2d 800 (8th Cir. 1968)); North Carolina (*McKinney v. Avery Journal, Inc.*, 99 N.C. App. 529, 532, 393 S.E.2d 295, 297 (1990)); Texas (*Merco Joint Venture v. Kaufman*, 923 F. Supp. 924, 927 (W.D. Tex. 1996)

under the laws of at least seven states,<sup>10</sup> courts have expressly extended the defense to other periodicals or daily newspapers. Insofar as one of the main reasons for a privilege for relying on wire service reports (enabling local news services to publish national news stories without inordinate fear of liability) equally applies to other kinds of news publications, especially when such publications are likewise available via the Internet and other forms of telecommunications, it should be possible in any state that acknowledges a wire service defense to argue that the defense should extend to other reliable news publications as well. Moreover, given the widespread adoption of at least the wire service defense, it is reasonable to believe that other state courts whose case law is silent on the issue would adopt something like the republication privilege if presented with an opportunity to do so.

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(noting that “the wire service defense and the [statutory] liability of broadcaster defense are correlative enough to be used interchangeably”); Virginia (*Winn v. UPI*, 938 F. Supp. 39, 44-46 (D.D.C. 1996), *aff’d*, No. 96-7217, 1997 WL 404959 (D.C. Cir. 1997)); and Wisconsin (*Van Straten v. Milwaukee Journal Newspaper-Publisher*, 151 Wis. 2d 905, 920, 447 N.W.2d 105, 112 (Wis. Ct. App. 1989)). However, in dicta in one relatively recent case arising under Pennsylvania law, a court has stated that “the wire service defense is currently unavailable under Pennsylvania law.” *Friedman v. Israel Labour Party*, 957 F. Supp. 701, 715 (E.D. Pa. 1997).

Courts in at least three other states have declined to determine whether there is a “wire service defense” under a particular state law because a determination on that issue was not needed to rule in defendant’s favor. See *Davis v. The Tennessean*, 83 S.W.3d 125, 127 (Tenn. Ct. App. 2001); *Treff v. Kearns-Tribune Corp.*, No. 981053-CA, 1998 WL 1758417, at \*1 (Utah App. Oct. 22, 1998). Compare the statement of the California Supreme Court in *Khawar v. Globe Intern., Inc.*, 19 Cal. 4th 254, 268 n.1, 965 P.2d 696, 704 n.1, 79 Cal.Rptr.2d 178, 186 n.1 (1998), *cert. denied*, 526 U.S. 1114 (1999), that the “‘wire service defense’ ... has yet to been considered by any published decision of a court of this state,” with the unreported decision by the California Superior Court in *Peper v. Gannett Co.*, No. 2002061753, 2003 WL 22457121, at \*6 (Cal. Sup. Apr. 4, 2003), *aff’d*, 2004 WL 2538839 (Cal. App. Nov. 10, 2004), that “[u]nder the ‘wire service doctrine,’ ... a defendant’s reliance on a reputable wire service precludes any finding of negligence.”

<sup>10</sup> In addition to New York, these states include Arizona (*Matter of Medical Lab. Mgt. Consultants*, 931 F. Supp. 1487, 1492 (D. Ariz. 1996) (under the First Amendment and perhaps also Arizona law, television station entitled to rely on “wire service defense” in running nationally broadcast television program)); Florida (*Nelson v. Associated Press, Inc.*, 667 F. Supp. 1468, 1476-77 (S.D. Fla. 1987)); Illinois (*Kapetanovic v. Stephen J. Productions, Inc.*, No. 97 C 2224, 2002 WL 475193, at \*7 (N.D. Ill. Mar. 27, 2002) (television station entitled to rely on “wire service defense” in running nationally syndicated television program)); Massachusetts (*Reilly v. Associated Press*, 59 Mass. App. Ct. 764, 779, 797 N.E.2d 1204, 1217 (2003), *review denied*, 441 Mass. 1103, 803 N.E.2d 333 (2004) (recognizing the Associated Press’s “reverse wire service defense” for relying on *Boston Herald* article)); North Carolina (*McKinney v. Avery Journal, Inc.*, 99 N.C. App. 529, 532, 393 S.E.2d 295, 297 (1990)); and Virginia (*Winn v. UPI*, 938 F. Supp. 39, 44-46 (D.D.C. 1996), *aff’d*, No. 96-7217, 1997 WL 404959 (D.C. Cir. 1997)).

Although the applicable framework in the particular case for applying the republication privilege (e.g., negligence, common law malice, “gross irresponsibility,” or “actual malice”) remains an important variable, as a practical matter, the republication privilege serves as an absolute safe harbor for republication, regardless of the applicable framework, where the source is reliable, where the republished report is straightforward and does not suggest on its face a factual error, an apparent inconsistency, or the need for further investigation, and, of course, where the republisher does not distort the original report or ignore intervening potentially exonerating reports. Under such circumstances, a republisher should be able to successfully maintain not only that its republication was neither reckless nor grossly irresponsible but that it did not violate its duty of ordinary care to the plaintiff and therefore it was not negligent either.

The “republication privilege” is clearly not a blank check for republication. First of all, the good reputation of the original source for reliable reporting is critical to the successful invocation of the republication privilege. In *Tzougrakis v. Cyveillance, Inc.*, the defendant republisher successfully argued that it had previously published releases from its original source without any allegations of libel, that the company’s reputation for reliable reports was good, and that there were no facts in the release that should have aroused suspicions about its accuracy or required further inquiry. In the other New York cases, *Newsday*, *The New York Post*, the CBC and UPI have passed the test. Given the trail of litigation that lies in their wake, such reliance on the good reputation of publications such as *The National Enquirer* and *The Globe* might not pass muster, however (or, at the very least, the validity of such reliance would involve triable issues of fact). Moreover, the question of a publication’s reputation for reliability may present a

moving target. Recent libel claims against a particular source previously determined to be reliable may permit a plaintiff to argue that, as of the time of the republication in question, it had become unreasonable to continue to rely on it.

Second, notwithstanding the good reputation of the original source, the republisher still must demonstrate that its use of the source is not grossly irresponsible (or malicious or reckless or negligent, depending on the applicable standard). For example, the republisher ignores at its peril developments subsequent to the original report – such as denials by the accused, acquittals or reversals of verdicts – that may call the accuracy of the original report into question. Similarly, the republication privilege does not entitle a republisher to make an unbalanced report that either removes qualifications contained in the original source (e.g., “alleged,” “according to police”) or ignores potentially exonerating information contained in the original source.

Third, the republication privilege concerns acceptance of the truth of an original report; it does not constitute a defense to liability for defamation where the original report does not vouch for the truth of the allegation in question. One should not confuse the republication privilege with a “neutral reportage” privilege. For example, if one republishes a reliable newspaper’s report that a famous child actress has accused her famous father of child abuse (where that newspaper merely reported that the allegation had been made but did not vouch for its truth), the republication privilege affords the republisher a safe harbor against liability only as to the fact that she made such an accusation, but not for having republished her possibly defamatory statement about her father. Notwithstanding the absence of an absolute defense for doing so, other factors may weigh in favor of reporting her allegations, such as determinations that she is a reliable

source, that the father will not commence litigation against the daughter or publications that report the allegations, that also reporting the father's denial of the allegations militates against the possibility of damages, and/or that the report has already been republished by other reputable publications.<sup>11</sup>

Despite these limitations, the importance of the republication privilege is clear. Where a report by a reliable source is straightforward and does not suggest on its face a factual error, an apparent inconsistency, or the need for further investigation, and, of

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<sup>11</sup> There has been some confusion on this point. In at least one decision under New York law, a court has invoked the republication privilege in circumstances that involved republishing reports of allegations where, although there was no question that such allegations had been made, the original news organization source did not claim that the allegations were true.

Thus, in *Bryks v. Canadian Broadcasting Corp.*, 928 F. Supp. 381, 383-84 (S.D.N.Y. 1996), the republication privilege was applied to CNN's report, based on the second of two Canadian Broadcasting Corp. broadcasts, concerning allegations that the principal of a Manitoba Orthodox Jewish school engaged in sexual misconduct with students during the previous decade. Notably, the court rejected plaintiff's argument that one of the CBC programs contained "red flags" that should have alerted CNN to the need for independent verification of the allegations. "First, the fact that the Report addressed sexual misconduct did not render the Report inherently incredible because allegations of wrongdoing are published nearly every day and involve people worldwide." *Id.*, at 385 (quotation omitted). Second, "the anonymity of some of the victims interviewed for the Report was not unusual. Parents of sexual abuse victims who make public allegations often insist on anonymity to protect their children from further trauma. In many states, the anonymity of child sexual assault victims is guaranteed by statute." *Id.* As far as one can tell from the *Bryks* decision, the CNN report contained statements by parents of purported victims accusing Bryks of sexual misconduct and reported that he was under investigation, but it did not directly state that Bryks was guilty of such misconduct.

In *Bryks* CNN clearly did not have any reason to doubt the CBC's report that various parents had accused Bryks of sexual misconduct and that the Canadian police were investigating those accusations. But the real question was not the accuracy of the CBC's report that such accusations had been made but whether the CBC committed libel simply by republishing the parents' allegations, as to the correctness of which the CBC apparently made no expressed determination. In this respect, the *Bryks* decision seems to answer the wrong question. The issue raised by the case was not whether to apply the republication privilege but instead whether there is any "neutral reportage" privilege and, if so, whether it might extend to a news organization's report of private accusations made in the context of a police investigation, or perhaps to such private accusations where sexual misconduct in religious schools is deemed a matter of public concern. Although a "neutral reportage" privilege is not recognized under New York law, *Hogan v. Herald Co.*, 84 A.D.2d 470, 479, 446 N.Y.S.2d 836, 842 (4<sup>th</sup> Dep't), *aff'd*, 58 N.Y.2d 630, 458 N.Y.S.2d 538 (1982), at least with respect to statements about public figures, the Second Circuit has held that the First Amendment requires application of the neutral reportage privilege. *Konikoff v. Prudential Ins. Co.*, 234 F.3d 92, 105 n.11 (2d Cir. 2000); *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113, 120 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977). Thus, the *Bryks* decision may have been cast as a republication privilege case because it did not involve public figures. Jurisdictions across the United States vary widely as to the existence and scope of any neutral reportage privilege. See discussion in *Khawar v. Globe Intern., Inc.*, 19 Cal.4th at 268-73, 965 P.2d at 704-08, 79 Cal.Rptr.2d at 186-190; see also, e.g., *Norton v. Glenn*, 860 A.2d 48, 52-59 (Pa. 2004), *cert. denied*, 125 S.Ct. 1700 (2005) (neither U.S. Constitution nor Pennsylvania law mandates neutral reportage doctrine).

course, where the republisher does not distort the original report and there have been no intervening potentially exonerating reports, the doctrine operates as a safe harbor for republishing the report.