

A BROADER APPROACH TO THE SUBSTANTIAL TRUTH DEFENSE

A good reputation is valued in our society.¹ Accordingly, the law recognizes the tort action of defamation² in order to compensate a person when his or her reputation is damaged in the estimation of others.³ To establish a *prima facie* case of defamation, the plaintiff must show that the words which allegedly caused the reputational damage may be interpreted as defamatory.⁴ The plaintiff also must show that the words reached at least one other person and that this person reasonably understood the words to be defamatory.⁵ Furthermore, the plaintiff must allege that the defendant was at minimum negligent in making the challenged statements.⁶ Finally, to complete the *prima facie* case, the plaintiff must show that the challenged statements are false.⁷

Consistent with the idea that defamation must consist of a *false*, derogatory statement, the literal truth of an otherwise defamatory statement was historically a complete defense to a defamation action.⁸ Because it is virtually impossible to prove the literal truth of every expression published, however, courts recognized that the literal truth requirement placed a particularly heavy burden on media defendants in defamation actions.⁹ Consequently, courts developed the "substantial truth" defense. This defense

¹ PROSSER AND KEETON ON TORTS § 113, at 804 (5th ed. 1984) [hereinafter PROSSER].

² Defamation is a generic term covering both libel (essentially written defamation) and slander (essentially spoken defamation). Because of the often intricate and blurred distinctions between libel and slander, this note uses the more general term defamation to describe both torts. Some courts also ignore these differences and apply the same rules to both libel and slander. *E.g.*, O'Donnell v. Field Enters., 145 Ill. App. 3d 1032, 1036 n.2, 491 N.E.2d 1212, 1215 n.2 (1986) ("[A]ll distinctions between libel and slander, except as to whether the defamation was written or spoken, have been abolished and the rules applicable to slander are now applicable to libel as well.").

³ Dean Prosser defines damage to reputation as that which tends to "diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him [or her]." PROSSER, *supra* note 1, § 111, at 773. *See also* RESTATEMENT (SECOND) OF TORTS § 559 comment b (1977) [hereinafter RESTATEMENT].

⁴ *See* PROSSER, *supra* note 1, § 113, at 802. In order to be capable of a defamatory interpretation, the court must find that the challenged statement would produce reputational damage. *Id.* § 111, at 781.

⁵ *Id.* § 113, at 797-98. *See also* RESTATEMENT, *supra* note 3, at § 558(b).

⁶ *See generally* PROSSER, *supra* note 1, § 113, at 803; RESTATEMENT, *supra* note 3, at § 558(c).

⁷ *See* *Jadwin v. Minneapolis Star & Tribune Co.*, 390 N.W.2d 437, 440 (Minn. Ct. App. 1986). In a minority of states it is possible for a true statement to be defamatory if it is published maliciously for no legitimate reason other than to hurt someone. PROSSER, *supra* note 1, § 116; RESTATEMENT, *supra* note 3, at § 581A, comment a. In general, however, the statement must be false and also must be capable of a defamatory meaning. PROSSER, *supra* note 1, at § 116; RESTATEMENT, *supra* note 3, at § 581A, comment a. A plaintiff cannot bring a defamation action simply because the plaintiff finds the statement personally objectionable. *Johnson v. Dirkswager*, 315 N.W.2d 215, 218 (Minn. 1982); *Bobb v. Kraybill*, 354 Pa. Super. 361, 365-66, 511 A.2d 1379, 1381 (1986), *appeal denied*, 513 Pa. 633, 520 A.2d 1384 (1987); *Stones River Motors, Inc. v. Mid-South Publishing Co.*, 651 S.W.2d 713, 719 (Tenn. Ct. App. 1983); RESTATEMENT, *supra* note 3, at § 566.

⁸ *See* C. LAWHORNE, *THE SUPREME COURT AND LIBEL* 2-3 (1981); Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789, 790-91 (1964).

⁹ *E.g.*, *Jackson v. Pittsburgh Times*, 152 Pa. 406, 412, 25 A. 613, 615 (1893) ("It is not necessary to be correct in every word . . . that is not common sense, and could not be done [by a newspaper]."). *See also* B. SANFORD, *SYNOPSIS OF THE LAW OF LIBEL AND THE RIGHT OF PRIVACY* 16 (1981). This

eases¹⁰ the defendant's burden of proof by allowing concededly untrue statements to bar recovery if the statements are close enough to the literal truth to be "substantially true."¹¹

In determining whether a statement is truthful enough to be a defense to a defamation claim, courts analyze the defamatory statement's effect on the mind of the average reader or listener.¹² If the court concludes that the difference between the literal truth and the defamatory statement is inconsequential in the mind of the average recipient, the defendant is not liable for any damage caused by the statement.¹³ Although all courts that have adopted the substantial truth defense focus on the statement's effect on the recipient, courts use differing approaches to determine to what extent a statement may deviate from the literal truth and still remain "substantially" true. Originally, courts relaxed the defense of truth to allow only minor inaccuracies of expression, such as incorrectly describing the color of a person's car, to withstand a defamation action.¹⁴ This restrictive approach still is employed in a majority of jurisdictions.¹⁵

As the substantial truth defense evolved, however, other courts applied this "defamatory effect" test with increasingly liberal interpretations of the standard. These courts extended the range of the defense to cover exaggerations of an otherwise true statement.¹⁶ For example, these courts would find that an account of a theft charging that plaintiff stole \$50,000 would be substantially true if the defendant proved that the plaintiff stole only \$500.¹⁷ Recently, in *Shihab v. Express News Corp.*,¹⁸ a Texas appellate court extended the substantial truth defense even further by allowing proof of a *different* but equally opprobrious action to satisfy the substantial truth requirement. The *Shihab* court stressed that a defamation action should turn on whether the plaintiff's reputation

note deals primarily with media defendants as many defamation actions involve the media. The defense of substantial truth is, however, equally applicable to all defamation defendants.

¹⁰ See, e.g., *Gomba v. McLaughlin*, 180 Colo. 232, 236, 504 P.2d 337, 338-39 (1972).

¹¹ *Williams v. WCAU-TV*, 555 F. Supp. 198, 202 (E.D. Pa. 1983); *Fairbanks Publishing Co. v. Pitka*, 376 P.2d 190, 193 (Alaska 1962); *Fendler v. Phoenix Newspapers, Inc.*, 130 Ariz. 474, 479, 636 P.2d 1257, 1261 (1981); *Goodrich v. Waterbury Republican-American*, 188 Conn. 107, 112-13, 448 A.2d 1317, 1322 (1982).

¹² *Gomba*, 180 Colo. at 236, 504 P.2d at 339; *Strada v. Connecticut Newspapers, Inc.*, 193 Conn. 313, 322, 477 A.2d 1005, 1010 (1984); *Gannett Co. v. Re*, 496 A.2d 553, 557 (Del. 1985); *Crites v. Mullins*, 697 S.W.2d 715, 717 (Tex. Ct. App. 1985).

¹³ *Crites*, 697 S.W.2d at 717.

¹⁴ E.g., *Conner v. Standard Publishing Co.*, 183 Mass. 474, 477-78, 67 N.E. 596, 597 (1903) (whether horse is bay or white insignificant).

¹⁵ See *infra* note 39 for a list of states that follow the substantial truth defense today. The author has assigned labels to each approach — slight inaccuracies, exaggeration, and *Shihab* — for ease of discussion; these are not commonly used labels. Courts generally do not explain what approach they are using and the cases may not always fit neatly under one approach or another.

Twenty-seven states use the "slight inaccuracies" approach. See *infra* text accompanying notes 43-74 for a discussion of cases following the "slight inaccuracies" approach. Although seventeen of the twenty-seven states use this standard exclusively, seven of the twenty-seven states also use the "exaggeration" approach.

¹⁶ E.g., *Crites*, 697 S.W.2d at 717 ("A showing of substantial truth will defeat an allegation of libel, even where the misconduct charged may be exaggerated, if no more opprobrium would be attached to appellant's actions merely because of such exaggeration."); *Fort Worth Press Co. v. Davis*, 96 S.W.2d 416, 419 (1936) (substantial truth defense allowed where plaintiff wasted \$17,500 of taxpayers' money, not \$80,000 as charged, because the court concluded that the sting of defamation was the charge of wasting money not the amount wasted).

¹⁷ *Weisburgh v. Mahady*, 147 Vt. 70, —, 511 A.2d 304, 306 (1986).

¹⁸ 604 S.W.2d 204 (Tex. Civ. App. 1980).

actually was damaged in the minds of the recipients, not on how consistent the defamatory statement was with the truth.¹⁹

This note examines the common law development of the defense of substantial truth and asserts that the approach used by the *Shihab* court correctly moves toward a more appropriate approach to applying the defense. Section I will focus on the evolution of the defense, including, in subsection A, both its historical development²⁰ and the relationship between the common law defamation action and the first amendment's guarantee of freedom of speech.²¹ Subsection B will analyze the differing approaches courts use today in applying the substantial truth defense.²² Section II will examine the rationale for further expansion of the substantial truth defense.²³ This note will conclude that the *Shihab* court's approach, where different though equally opprobrious actions satisfy the substantial truth defense, is the appropriate and desirable approach to applying the defense.

I. THE DEVELOPMENT OF THE SUBSTANTIAL TRUTH DEFENSE IN DEFAMATION ACTIONS

A. Common Law and Constitutional Evolution of the Defense of Substantial Truth

Anglo-American defamation law traces its roots to the middle ages. The civil defamation cause of action developed from the English criminal defamation actions that began in the twelfth and thirteenth centuries.²⁴ The king's courts established criminal penalties for verbal attacks on the reputations of the "great magnates of the realm," as such disputes often led to violence rather than resolution in a local or church court.²⁵ Under the *De Scandalis Magnatum*, enacted in 1275, and in the deliberations of the Court of Star Chamber, truth was not a defense to a criminal defamation action because accuracy did not necessarily prevent "breaches of the king's peace" by those who had been defamed.²⁶ By the late seventeenth century, however, courts accepted the idea that truth was a complete defense in criminal defamation actions.²⁷

¹⁹ *Id.* at 208.

²⁰ See *infra* notes 24-33 and accompanying text.

²¹ See *infra* notes 34-38 and accompanying text.

²² See *infra* notes 39-107 and accompanying text.

²³ See *infra* notes 108-36 and accompanying text.

²⁴ See generally N. ROSENBERG, *PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL* 3-4 (1986).

²⁵ *Id.* at 4.

²⁶ *Id.* at 4-5. The *De Scandalis Magnatum* declared that slandering the great men of England was a crime. *Id.* at 4. The Star Chamber was a notorious body of judges who illegally exceeded their authority, especially by enforcing the king's arbitrary pronouncements. BLACK'S LAW DICTIONARY 1261 (5th ed. 1979). Before it was abolished in 1641, the Star Chamber defined the basic concepts of criminal libel which the common law courts adopted. ROSENBERG, *supra* note 24, at 4-5.

²⁷ LAWHORNE, *supra* note 8, at xvi. Apparently the defense of truth was first recognized in American law in 1692 for criminal defamation in the first recorded case against a newspaper printer. *Id.* In this break from the previously accepted English law, the Quaker judges in Philadelphia allowed one of the defendants to submit evidence of the truth as justification for the criminal libel charge. *Id.* Truth finally entered the forefront of defamation law in 1735 in the widely publicized trial of publisher John Peter Zenger. *Id.* at xvi-xvii. The jurors found that Zenger had published a criticism of Governor William Cosby as alleged, but more importantly the jurors also found that the criticism was true and hence not libelous. *Id.* at xvii.

The Sedition Law, passed a few years after the first amendment to the United States Constitution was adopted, criminalized defamatory statements concerning the government. *Id.* at 2.

Criminal defamation actions gradually gave way to civil defamation actions when injured plaintiffs began demanding compensation for the damage caused to their reputations.²⁸ Although courts were slower to adopt truth as a complete defense in civil defamation cases, by the late eighteenth or early nineteenth century most courts did allow the defendant to assert truth as a defense.²⁹ At this time, courts required the defendant to prove the literal truth of the communication to establish the defense.³⁰ Courts imposed this difficult burden on the defendant partly because of the strong traditional presumption in favor of the plaintiff that a person has a right to have his or her reputation undamaged by false statements.³¹

Despite this traditional view, the literal truth requirement gradually gave way to the substantial truth defense. This defense eased the difficult burden of justifying each challenged statement by allowing proof of the substantial truth of each statement to defeat liability.³² The defense developed both from the common law equitable notion that it is unfair to require the defendant to justify every insignificant detail,³³ as well as

Although this law abridged first amendment rights, it explicitly approved of the defense of truth in actions brought under the Sedition Law. *Id.* By the time the Sedition Law expired in 1801, three years after its enactment, truth as a complete defense had been adopted in most state laws and constitutions, and accepted by the courts. *Id.* at 3.

²⁸ See ROSENBERG, *supra* note 24, at 5. Another reason that criminal defamation actions fell into disuse in the United States is that colonial juries refused to indict publishers for defamatory attacks on the government. See LAWHORNE, *supra* note 8, at 1 & n.4.

²⁹ The history of the defense of truth in civil defamation actions is uncertain. Ray, *Truth: A Defense to Libel*, 16 MINN. L. REV. 43, 49 (1931). Professor Ray uses Townsend's explanation, in TOWNSEND, SLANDER & LIBEL (3d.), of the early civil defamation law. Ray, *supra*, at 49.

Scholars are split over whether truth was always a defense to defamation. *Id.* One commentator suggests that the beginning of the common law rule allowing truth as a defense in civil actions occurred around 1716 after the passage of the Statute of Anne. *Id.* at 50. Until about 1735, however, this statute only allowed defendants to plead truth in mitigation, not as a complete defense. *Id.* at 50-51. Sometime after 1735, though, truth acted as a complete defense. *Id.* at 51. Another commentator maintains that truth has been a complete defense in English civil defamation cases for centuries and that the American states early adopted this rule. Franklin, *supra* note 8, at 790-91.

About the same time that truth became firmly recognized by many courts as a complete defense in both criminal and civil defamation actions, statutes and state constitutional provisions were enacted to expressly adopt truth as a defense. In 1790, for example, Pennsylvania added a constitutional provision which allowed the admission of truth as evidence in a criminal defamation action. See Ray, *supra*, at 46 n.16. By 1799, Kentucky, Tennessee, Ohio, and New Jersey had followed suit. *Id.*

³⁰ *Gomba v. McLaughlin*, 180 Colo. 232, 236, 504 P.2d 337, 338 (1973); *Tschirgi v. Lander Wyoming State Journal*, 706 P.2d 1116, 1120 (Wyo. 1985). See M. NEWELL, THE LAW OF SLANDER AND LIBEL § 956 (3d. ed. 1914).

³¹ See SANFORD, *supra* note 9, at 7 ("The law has recognized for centuries that every person has a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit.").

³² PROSSER, *supra* note 1, § 116, at 842 ("[I]t is not necessary to prove the literal truth of the accusation in every detail, and . . . it is sufficient to show that the imputation is substantially true, or, as it is often put, to justify the 'gist,' the 'sting,' or the 'substantial truth' of the defamation." (citations omitted)).

³³ E.g., *Tschirgi*, 706 P.2d at 1120 ("Increasingly courts have recognized that injustice often resulted from requiring literal or precise accuracy in a statement, and the trend has been toward a relaxing of this requirement."). While substantial truth is primarily a common law defense, a large majority of states have enacted constitutional or statutory provisions declaring the right of a defendant to present evidence of truth as a bar to a criminal or a civil defamation action. See, e.g., DEL. CONST. art. 1, § 5 (criminal); IOWA CONST. art. 1, § 7 (criminal); DEL. CODE ANN. tit. 10, § 3919

the recognition that the first amendment guaranteed defendants certain freedom of speech rights.

Although the United States Supreme Court has never directly addressed the common law defense of substantial truth,³⁴ the Court has recognized the tension between the policies underlying the defamation laws, and the freedom of speech and of the press guaranteed by the first amendment.³⁵ The Court has stated that it is necessary to balance

(1975). The Pennsylvania statute specifically mentions the substantial truth defense. See 42 PA. CONS. STAT. ANN. § 8342 (Purdon 1982). This statute, originally enacted in 1901, reads as follows:

In all civil actions for libel, the plea of justification shall be accepted as an adequate and complete defense, when it is pleaded, and proved to the satisfaction of the jury . . . that the publication is *substantially true* and is proper for public information or investigation, and has not been maliciously or negligently made.

Id. (emphasis added). Other states refer only to truth in their statutes or constitutional provisions, but allow substantial truth to satisfy the defense through common law interpretations. For example, Virginia's statute states: "In any action for defamation, the defendant may justify by alleging and proving that the words spoken or written were *true* . . ." VA. CODE ANN. § 8.01-46 (1984) (emphasis added). The Virginia Supreme Court of Appeals (currently the Virginia Supreme Court), however, in 1956 interpreted under the corresponding provision of former law that "[s]light inaccuracies of expression are immaterial." *Saleeby v. Free Press*, 197 Va. 761, 763, 91 S.E.2d 405, 407 (1956). The court continued that a statement need only be "substantially" true. *Id.* See *infra* note 39 for a list of states recognizing the substantial truth defense.

³⁴ See generally *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 137 (1967) (Court distinguished the substantial truth defense from constitutional defenses and discussed only the constitutional claims).

The Supreme Court has addressed the question of which party to a defamation action has the burden of proving the truth or falsity of a defamatory statement. The burden of proof under the substantial truth defense has been a widely debated issue. Originally, courts required the defendant to affirmatively raise the defense of truth. PROSSER, *supra* note 1, § 116, at 839. Following the Supreme Court decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), some courts shifted the burden to the plaintiff to prove the falsity of a statement, while other courts maintained that the defendant still carried the burden of proof. See *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558, 1561 n.2 (1986).

Recently in *Hepps*, the Supreme Court declared in a five-to-four decision that for actions involving public issues, the plaintiff bears a constitutionally mandated burden to prove the falsity of the defamatory material. *Id.* at 1563. The Court determined that where the issue involved is one of public concern, the common law presumption of falsity is inapplicable, whether the plaintiff is a public or private figure. *Id.* at 1563, 1564. In fact, the substantial truth defense bypasses the constitutional issues raised in such landmark decisions as *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Both *New York Times* and *Gertz* addressed the level of media fault that certain plaintiffs must establish in order to recover for reputational damage. The standard of fault developed first in *New York Times*, the "actual malice" standard, involves false statements of fact made by the media concerning the plaintiff. *New York Times*, 376 U.S. at 256. Actual malice is a standard that a public official, *id.* at 279-80, or public figure, *Butts*, 388 U.S. at 155, must prove before he or she can recover damages for a false and defamatory statement. The Court defined actual malice as a false statement made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 279-80. Therefore, if the court determines that the statement is true or substantially true, i.e. that it is not false, it is unnecessary for the court to reach the constitutional actual malice concerns. *E.g.*, *Sivulich v. Howard Publications*, 126 Ill. App. 3d 129, 130, 466 N.E.2d 1218, 1219 (1984); *Tschirgi v. Lander Wyoming State Journal*, 706 P.2d 1116, 1118 (Wyo. 1985).

³⁵ The first amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and the petition the Government for a redress of grievances." U.S. CONST. amend. 1.

the individual's right to his or her reputation with the media's freedom to publish disparaging comments without fear of suit.³⁶ The Court has noted that it is "especially anxious" to assure that the freedoms of speech and press are given essential "breathing space."³⁷ To that end, the Court has reasoned that rules that unduly burden media defendants are inconsistent with the first amendment because they promote media self-censorship and stifle vigorous discussion of public issues and concerns.³⁸ In accordance with these Supreme Court concerns, state courts developed the defense of substantial truth to ease the burden on media defendants and accommodate their right to freedoms of speech and press.

In sum, civil defamation actions developed from the early criminal actions. Initially courts allowed only the literal truth to act as a defense to a defamation charge. Gradually, however, through recognition of the media defendant's first amendment rights and the difficult burden of proving the literal truth, courts allowed defendants to escape liability if the defamatory statement was "substantially true."

B. Application of the Substantial Truth Defense

Today at least forty-one states recognize the common law defense of substantial truth.³⁹ Each of these jurisdictions determines the substantial truth by looking to the

³⁶ See, e.g., *Gertz*, 418 U.S. at 341; *Butts*, 388 U.S. at 153.

³⁷ *Gertz*, 418 U.S. at 342.

³⁸ *Id.* at 340-41; *New York Times*, 376 U.S. at 278-79.

³⁹ See *Johnson Publishing Co. v. Davis*, 271 Ala. 474, 487, 124 So. 2d 441, 450 (1960); *Fairbanks Publishing Co. v. Pitka*, 376 P.2d 190, 193 (Alaska 1962); *Fendler v. Phoenix Newspapers, Inc.*, 130 Ariz. 475, 479, 636 P.2d 1257, 1261 (Ariz. Ct. App. 1981); *Pritchard v. Times Southwest Broadcasting, Inc.*, 277 Ark. 458, 463, 642 S.W.2d 877, 879 (1982); *Emde v. San Joaquin County Cent. Labor Council*, 23 Cal. 2d 146, 160, 143 P.2d 20, 28 (1943); *Gomba v. McLaughlin*, 180 Colo. 232, 236, 504 P.2d 337, 339 (1972); *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 113, 448 A.2d 1317, 1322 (1982); *Gannett Co. v. Re*, 496 A.2d 553, 557 (Del. 1985); *Florida Publishing Co. v. Lee*, 76 Fla. 405, 411-12, 80 So. 245, 246 (1918); *Jones v. Neighbor Newspapers, Inc.*, 142 Ga. App. 365, 369, 236 S.E.2d 23, 25 (1977); *Kohn v. West Hawaii Today, Inc.*, 65 Haw. 584, 590-91, 656 P.2d 79, 84 (1982); *Baker v. Burlington Northern, Inc.*, 99 Idaho 688, 690, 587 P.2d 829, 831 (1978); *Sivulich v. Howard Publications, Inc.*, 126 Ill. App. 3d 129, 131, 466 N.E.2d 1218, 1220 (1984); *Walford v. Herald Printing & Publishing Co.*, 133 Ind. 372, 373-74, 32 N.E. 929, 929 (1893); *Hovey v. Iowa State Daily Publication Bd., Inc.*, 372 N.W.2d 253, 256 (Iowa 1985); *Hein v. Lacy*, 228 Kan. 249, 259, 616 P.2d 277, 284 (1980); *Pearce v. Courier-Journal*, 683 S.W.2d 633, 635 (Ky. Ct. App. 1985); *Batiste v. Guiteau*, 413 So. 2d 559, 563 (La. Ct. App. 1982); *Picard v. Brennan*, 307 A.2d 833, 835 (Me. 1973); *Conner v. Standard Publishing Co.*, 183 Mass. 474, 477, 67 N.E. 596, 597 (1903); *Hayes v. Booth Newspapers, Inc.*, 97 Mich. App. 758, 777, 295 N.W.2d 858, 867 (1980); *Jadwin v. Minneapolis Star & Tribune Co.*, 390 N.W.2d 437, 441 (Minn. Ct. App. 1986); *Smith v. Byrd*, 225 Miss. 331, 334-35, 83 So. 2d 172, 175 (1955); *Turnbull v. Herald Co.*, 459 S.W.2d 516, 519 (Mo. Ct. App. 1970); *Chagnon v. Union-Leader Co.*, 103 N.H. 426, 437, 174 A.2d 825, 833 (1961), *cert. denied*, 369 U.S. 830 (1962); *Hermann v. Newark Morning Ledger Co.*, 48 N.J. Super. 420, 431-32, 138 A.2d 61, 67 (1958); *Coronado Credit Union v. Koat Television, Inc.*, 99 N.M. 233, 238, 656 P.2d 896, 901 (N.M. Ct. App. 1982); *Korkala v. W.W. Norton & Co.*, 618 F. Supp. 152, 155 (S.D.N.Y. 1985); *Dental Care Clinic v. McDonough*, No. 50242, (Ohio Ct. App. May 8, 1986); *Akins v. Altus Newspapers, Inc.*, 609 P.2d 1263, 1266 (Okla. 1977); *Shirley v. Freunscht*, 81 Or. App. 221, 224, 724 P.2d 907, 910 (1986); *Bobb v. Kraybill*, 354 Pa. Super. 361, 366, 511 A.2d 1379, 1381 (1986), *appeal denied*, 513 Pa. 633, 520 A.2d 1384 (1987); *Ross v. Columbia Newspapers, Inc.*, 266 S.C. 75, 80, 221 S.E.2d 770, 772 (1976); *Windsor v. Tennessean*, 654 S.W.2d 680, 686 (Tenn. Ct. App. 1983); *Downer v. Amalgamated Meatcutters & Butcher Workmen of N. Am.*, 550 S.W.2d 744, 747 (Tex. Civ. App. 1977); *Weisburgh v. Mahady*, 147 Vt. 70, —, 511 A.2d 304, 306 (1986); *Saleeby v. Free Press*, 197 Va. 761, 763, 91 S.E.2d 405,

defamatory statement's effect on the mind of the average reader or listener.⁴⁰ If the effect of the "substantially true" defamatory statement is the same or relatively the same as a true defamatory statement, the defendant will not be found liable.⁴¹ In general, determining the effect the defamatory statement has on the mind of the recipient is a question of fact for the factfinder.⁴² Despite the widespread recognition of this standard, courts use different approaches in applying it. Each approach defines how far an allegedly defamatory statement may deviate from the truth before a different effect on the reader or listener results, thus defeating the substantial truth defense.

1. The "Slight Inaccuracies" Approach to the Substantial Truth Defense

The first courts to use the substantial truth defense did not expressly state that they were deviating from the previous literal truth requirement. As early as 1890, however, one court impliedly approved the substantial truth defense by recognizing that only the "material" elements of the alleged defamation must be true to defeat liability.⁴³ By 1893, the Supreme Court of Pennsylvania, in *Jackson v. Pittsburgh Times*, affirmed a judgment for a newspaper defendant on the express grounds that the defamatory article was substantially true.⁴⁴ In this case, the defendant printed an account of a fight in a flood

407 (1956); *Mark v. Seattle Times*, 96 Wash. 2d 473, 494, 635 P.2d 1081, 1092 (1981); *Kinney v. Daniels*, 574 F. Supp. 542, 546 (S.D.W. Va. 1983); *Gerol v. Arena*, 127 Wis. 2d 1, 7, 377 N.W.2d 618, 620-21 (Wis. Ct. App. 1985); *Tschirgi v. Lander Wyoming State Journal*, 706 P.2d 1116, 1120 (Wyo. 1985).

⁴⁰ See, e.g., *Williams v. WCAU-TV*, 555 F. Supp. 198, 202 (E.D. Pa. 1983) ("A statement is substantially accurate if its 'gist' or 'sting' is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced."); *Crites*, 697 S.W.2d at 717 ("The critical test is the effect on the mind of the reader or listeners . . .").

⁴¹ See, e.g., *Fendler*, 130 Ariz. at 479, 636 P.2d at 1261; *Kohn*, 65 Haw. at 590-91, 656 P.2d at 38-84.

⁴² *Kohn*, 65 Haw. at 591, 656 P.2d at 84; *Fields Found., Ltd. v. Christensen*, 103 Wis. 2d 465, 584, 309 N.W.2d 125, 135 (Wis. Ct. App. 1981); RESTATEMENT, *supra* note 3, at § 617(b) ("Subject to the control of the court whenever the issue arises, the jury determines whether . . . (b) the matter was true or false."); *Contra Rouch v. Enquirer & News of Battle Creek*, 137 Mich. App. 39, 43 n.2, 357 N.W.2d 794, 797 n.2 (1984) (substantial truth is a question of law for the judge).

Some courts determine that the issue of substantial truth is an appropriate question of law on summary judgment when there is no dispute to the facts underlying the issue of truth or falsity of the statement. E.g., *Williams v. WCAU-TV*, 555 F. Supp. 198, 203 (E.D. Pa. 1983); *Fendler*, 130 Ariz. at 480, 636 P.2d at 1262; *Downer*, 550 S.W.2d at 746.

⁴³ *Republican Publishing Co. v. Mosman*, 15 Colo. 399, 410, 24 P. 1051, 1055 (1890).

⁴⁴ 152 Pa. 406, 25 A. 613 (1893). The Pennsylvania Supreme Court approved of the trial court's explanation of the law to the jury: "It is not necessary to be correct in every word, . . . that is not common sense, and could not be done; nobody could conduct a paper if that were so, but the law is that it has to be a fair and substantial account of the occurrence." *Id.* at 412, 25 A. at 615. The Supreme Judicial Court of Massachusetts approved of a similar lower court jury instruction in *Conner v. Standard Publishing Co.*, 183 Mass. 474, 67 N.E. 596 (1903). The court stated:

I don't say that [the defamatory statements] must be actually and literally true, because the difference may be a difference of no consequence. Suppose I should charge some man with stealing a bay horse, and, when I come to court to testify, it should prove to be a white horse; there would be no earthly difference in the charge, and I should prove it substantially if I should prove that the horse was a white horse, instead of a bay horse.

Id. at 477-78, 67 N.E. at 597.

Other courts around the turn of the century followed this approach. See, e.g., *Mathews v. Detroit Journal Co.*, 123 Mich. 608, 609, 82 N.W. 243, 243 (1900); *Sacchetti v. Fehr*, 217 Pa. 475, 476, 66 A. 742, 742 (1907).

stricken town between the plaintiff, a national guardsman who was drunk at the time of the fight, and a sheriff who lost his family in the flood.⁴⁵ The newspaper sensationalized the dialogue between the two combatants, casting the plaintiff as the drunken ruffian and his opponent as the righteous, bereaved flood survivor.⁴⁶ Although the newspaper printed an incorrect name for the sheriff, the court dismissed this as insignificant.⁴⁷ Furthermore, because there was evidence both that the plaintiff had been drinking and that an altercation between the two had taken place, the court deemed the substance of the article was close enough to the truth to defeat a defamation action.⁴⁸

Since these early decisions, courts consistently have allowed minor inaccuracies in a story's insignificant details to establish the substantial truth defense. Most courts reason that these "slight inaccuracies" are not sufficient to make an otherwise true defamatory statement actionable.⁴⁹ Courts have primarily applied this approach in cases where an incorrect though similar word is used to describe an incident. For example, in one case the defendant newspaper published an article that incorrectly reported that official documents accused the physician-plaintiff of improperly prescribing Demerol.⁵⁰ The court noted that the document actually said "controlled substances," not "Demerol."⁵¹ Nevertheless, the court found that the article was substantially true, despite this inaccuracy, because there was no appreciable difference in the defamatory effect on the reader of a statement that accused a physician of dispensing Demerol versus dispensing controlled substances.⁵²

Similarly, if the defendant misuses a technical term that the ordinary reader or listener would not be able to distinguish from the correct usage of the term, courts find that the inaccuracy is not enough to render the statement false.⁵³ An example would be substituting the word "burglary" for "larceny." Because the average person does not know the technical distinctions between the two terms, this inaccuracy would fall within the reach of the "slight inaccuracy" approach to applying the substantial truth defense.⁵⁴

The substantial truth defense generally fails, however, in states adhering to the "slight inaccuracies" approach if the defamatory charge made against the plaintiff is one of persistent misconduct, but the plaintiff committed the misconduct on only one occa-

⁴⁵ *Jackson*, 152 Pa. at 407-10, 25 A. at 613-14.

⁴⁶ *Id.*

⁴⁷ *Id.* at 411, 25 A. at 614.

⁴⁸ *Id.*

⁴⁹ This note has labelled this first group of cases the "slight inaccuracies" approach because the courts generally interpret the substantial truth defense to include only minor inaccuracies of expression or detail.

⁵⁰ *Pearce v. Courier-Journal*, 683 S.W.2d 633, 635 (Ky. Ct. App. 1985).

⁵¹ *Id.*

⁵² *Id.* See also *Hovey v. Iowa State Daily Publications Bd.*, 372 N.W.2d 253, 255 (Iowa 1985) (article stating plaintiff was raped substantially true when in fact she was forced to perform oral sex); *Tschirgi v. Lander Wyoming State Journal*, 706 P.2d 1116, 1120-21 (Wyo. 1985) (report that plaintiff was wrestled to ground by police substantially true when in fact he was wrestled against car).

⁵³ See generally *RESTATEMENT*, *supra* note 3, at § 581A comment f.

⁵⁴ See *id.* See also *Sivulich*, 126 Ill. App. 3d at 132, 466 N.E.2d at 1220 (article stating that charges of "aggravated battery," a felony, filed against plaintiff was substantially true given that common usage of "aggravated" means more severe, and the actual complaint against plaintiff alleged a violent and malicious battery); *Windsor v. Tennessean*, 654 S.W.2d 680, 686 (Tenn. Ct. App. 1983) (immaterial that newspaper stated plaintiff "signed" a subpoena, when he actually "issued" a subpoena, because average reader would not know mechanics by which subpoenas are issued).

sion.⁵⁵ Thus, one court found that showing that the plaintiff was convicted once for transporting women for the purpose of prostitution did not prove the truth of a statement that the plaintiff was a "pimp."⁵⁶ Similarly, another court held that proof of infidelity on one occasion was not enough to justify calling a woman a "dirty old whore."⁵⁷

Courts also do not allow the defendant to use the substantial truth defense under the "slight inaccuracies" approach when a socially unacceptable act is attributed incorrectly to the plaintiff instead of the actual actor. For example, the Massachusetts Court of Appeals has held that the substantial truth defense will not protect the media defendant who communicates all the details of a crime substantially accurately but then incorrectly identifies the plaintiff as the perpetrator.⁵⁸ In the 1979 case of *Liquori v. Republican Co.*, the Republican, a newspaper, required its reporters to give a street address of all defendants listed in any report of a judicial proceeding.⁵⁹ A reporter gathering information about "Anthony Liquori," who had changed his plea in a criminal conspiracy charge from not guilty to guilty, incorrectly used the street address of the plaintiff, a different "Anthony Liquori."⁶⁰ The court found the newspaper liable concluding that an article that incorrectly identifies a person who in fact had nothing to do with the crime is "neither fair nor accurate."⁶¹

Even in situations where the content of the alleged defamation is essentially correct, and the plaintiff is correctly identified, the defendant may not be able to rely on the substantial truth defense. For example, in the 1985 case of *Gannett Co. v. Re*, the substantial truth defense failed where a detail was omitted from a statement that would have reduced the statement's defamatory impact.⁶² In *Gannett*, a reporter for the defendant newspaper wrote an article concerning the plaintiff's indictment for charges of securities fraud, theft, attempted theft and conspiracy stemming from the plaintiff's attempt to finance an invention.⁶³ The court found that the article's account of all these charges was accurate.⁶⁴ The reporter concluded the article by discussing a demonstration of another invention, an airpowered car, that the plaintiff had conducted for the media nearly two years before.⁶⁵ The reporter stated that in the demonstration the car never started when in fact it had started, although only after repeated attempts, and traveled one-quarter mile at a speed of 10 miles per hour.⁶⁶ The newspaper contended that the truth was more damaging to the plaintiff's reputation than saying the car failed to start.⁶⁷ The court reasoned, however, that this final inaccurate statement in the context of the article concerning plaintiff's indictment for fraud and other charges lent a note of validity to the charges against plaintiff by implying that he had been deceitful on other

⁵⁵ See PROSSER, *supra* note 1, § 116, at 841.

⁵⁶ *Chiarella v. Passant*, 343 Pa. Super. 330, 341 n.5, 494 A.2d 1109, 1115 n.5 (1985).

⁵⁷ *Rutherford v. Paddock*, 180 Mass. 289, 293, 62 N.E. 381, 382 (1902).

⁵⁸ *Liquori v. Republican Co.*, 8 Mass. App. Ct. 671, 674, 396 N.E.2d 726, 728-29 (1979).

⁵⁹ 8 Mass. App. Ct. 671, 673, 396 N.E.2d 726, 728 (1979).

⁶⁰ *Id.* at 673-74, 396 N.E.2d at 728.

⁶¹ *Id.* at 674, 396 N.E.2d at 728 (quoting *Whitcomb v. Hearst Corp.*, 329 Mass. 193, 199, 107 N.E.2d 295, 299 (1956)).

⁶² 496 A.2d 533 (Del. 1985).

⁶³ *Id.* at 555-56.

⁶⁴ *Id.* at 556.

⁶⁵ *Id.*

⁶⁶ *Id.* at 555.

⁶⁷ *Id.* at 557.

occasions.⁶⁸ Therefore, the court concluded, the defamation was more damaging to the plaintiff than the truth, so the substantial truth defense did not apply.⁶⁹

A final example demonstrating the boundaries of the "slight inaccuracies" approach to the substantial truth defense is illustrated by *Prahl v. Brosmale*.⁷⁰ In *Prahl*, the Wisconsin Supreme Court cautioned that "the 'substantial truth' doctrine cannot sanitize a single, but glaring falsehood in a series of otherwise true statements."⁷¹ In *Prahl*, a television reporter showed scenes of police storming a scientist's house and arresting the scientist after some boys told the police that the scientist shot at them.⁷² The scientist was never charged with any crime, but the reporter stated over the air that the scientist was charged with reckless use of a firearm.⁷³ The court found that charging someone with a crime, when in fact no criminal charges were ever brought, is a blatant error.⁷⁴ Despite the accuracy of the remainder of the broadcast, the court concluded that the challenged broadcast was not substantially true.⁷⁵

In summary, the majority approach to applying the substantial truth defense, the "slight inaccuracies" approach, does not protect statements that deviate far from the literal truth. Under this approach, only minor inaccuracies in expression or mistakes in insignificant details excuse a defendant from liability. If the defendant incorrectly reports details that would affect a reader or listener, such as incorrectly identifying an innocent person as a criminal despite the accuracy of the remaining communication, or leaving out a detail that might reasonably lessen the defamatory impact of a statement, courts will refuse to apply the "slight inaccuracies" interpretation of the substantial truth defense to excuse the defendant's mistake.

2. The "Exaggeration" Approach to the Substantial Truth Defense

By the 1930s, some courts had begun to broaden the original application of the substantial truth defense. Instead of restricting the defense to minor inaccuracies in expression, courts began to allow the exaggeration of a defamatory charge to act as the substantial truth of the charge.⁷⁶ In *Fort Worth Press Co. v. Davis*, for example, the court deemed that the newspaper's accusation that the plaintiff wasted \$80,000 of taxpayer money was substantially true when the defendant publisher was able to prove conclusively that the plaintiff wasted \$17,500.⁷⁷ The court reasoned that no greater opprobrium was attached to the greater amount; the gist of the defamation was wasting the money.⁷⁸

Several jurisdictions continue to apply this "exaggeration" approach to determine whether a statement is substantially true.⁷⁹ In the 1977 case of *Downer v. Amalgamated*

⁶⁸ *Id.* at 558.

⁶⁹ *See id.* at 557-58.

⁷⁰ 98 Wis. 2d 130, 295 N.W.2d 768 (1980).

⁷¹ *Id.* at 141, 295 N.W.2d at 776.

⁷² *Id.* at 133-36, 295 N.W.2d at 772-73.

⁷³ *Id.* at 136, 295 N.W.2d at 773.

⁷⁴ *Id.* at 141, 295 N.W.2d at 776.

⁷⁵ *See id.*

⁷⁶ *See, e.g., Fort Worth Press Co. v. Davis*, 96 S.W.2d 416 (1936).

⁷⁷ *Id.* at 419.

⁷⁸ *Id.*

⁷⁹ This note uses the label "exaggeration" approach to describe all the cases in this category because all involve situations in which the defendant exaggerated a detail. Courts apply the substantial truth defense on the rationale that the exaggeration does not produce a different effect on the mind of the average reader or listener.

Meat Cutters & Butcher Workmen of North America, for example, the court held that proof that the plaintiff misappropriated \$840.73 of union funds established the substantial truth of the defendant's accusation that he stole \$2,187.77.⁸⁰ The court determined that the damage to the plaintiff's reputation resulted from the charge of stealing union funds, not from stealing a specific amount of union funds.⁸¹

A recent Vermont case, *Weisburgh v. Mahady*, also follows this more expansive view of the substantial truth defense.⁸² The court found that a charge that the plaintiff was arrested for receiving \$50,000 in stolen property was substantially true when the actual sum was only about \$500.⁸³ The court reasoned that the sting of the charge was receiving stolen property.⁸⁴ The amount of stolen property, the court concluded, would not change the effect on the mind of the reader.⁸⁵ Similarly, in *Turnbull v. Herald Co.*, a publisher successfully defended a defamation action even when it could prove that the police found only a few hundred dollars worth of jewelry during a police raid on the plaintiff's house instead of "thousands of dollars" worth of jewelry.⁸⁶ The court concluded that the gist of the newspaper account was the description of the arrest and that the inaccuracies in the jewelry's value would not affect the reader differently than would the literal truth.⁸⁷

This "exaggeration" approach to the substantial truth defense also is used in cases involving exaggeration of details other than the value of stolen goods or money. In an early case from the prohibition era, one court held that proving that the plaintiff was arrested for illegally possessing beer and wine was sufficient to show the substantial truth of a newspaper account stating that the plaintiff was arrested for illegally possessing tequila and whiskey, as well as beer and wine.⁸⁸ The court reasoned that the "gist" of the accusation was the arrest for illegal possession of intoxicants, and that proof of arrest for possession of wine and beer established the truth of the charge, since this was just as much an offense as possession of tequila and whiskey.⁸⁹

Not all exaggeration cases, however, are protected under the substantial truth defense. In the 1982 case of *Kohn v. West Hawaii Today, Inc.*, a newspaper truthfully reported that a grand jury issued twenty-two indictments for promotion of dangerous drugs including heroin, cocaine, hashish, and morphine.⁹⁰ The plaintiff's store was listed as one of the locations where the drugs were confiscated, although, in reality, police found only six grams of marijuana at the store.⁹¹ The Hawaii Supreme Court found no reason to overturn a jury verdict for the plaintiff, reasoning that the jury reasonably could conclude that an allegation of promoting the dangerous drugs listed in the article carried a far greater stigma than possessing a small amount of marijuana.⁹²

⁸⁰ 550 S.W.2d 744, 747 (Tex. Civ. App. 1977).

⁸¹ *Id.*

⁸² *Weisburgh v. Mahady*, 147 Vt. 70, 511 A.2d 304 (1986).

⁸³ *Id.* at —, 511 A.2d at 306.

⁸⁴ *Id.* at —, 511 A.2d at 306.

⁸⁵ *Id.* at —, 511 A.2d at 306.

⁸⁶ 459 S.W.2d 516, 519 (Mo. Ct. App. 1970).

⁸⁷ *Id.*

⁸⁸ *Lundberg v. Brownsville Publishing Co.*, 66 S.W.2d 375 (Tex. Civ. App. 1933).

⁸⁹ *Id.* at 376.

⁹⁰ 65 Haw. 584, 585, 656 P.2d 79, 80 (1982).

⁹¹ *Id.*

⁹² *Id.* at 591, 656 P.2d at 84.

In summary, some courts have expanded the substantial truth defense to apply to cases in which the value of goods or money stolen by the plaintiff has been exaggerated by media defendants. The jurisdictions applying this approach reason that the average reader or listener is affected more by the fact that the plaintiff stole than by the value of the goods or money in question. Consequently, under this approach, defendants may establish the substantial truth defense notwithstanding the fact that the defamatory statement contains more than a minor inaccuracy.

3. The "Shihab" Approach to the Substantial Truth Defense⁹⁵

Recently, one jurisdiction laid the framework for expanding the substantial truth defense beyond the exaggeration approach. In the 1980 case of *Shihab v. Express-News Corp.*,⁹⁶ the Texas Court of Civil Appeals modified the exaggeration approach the Texas courts consistently had used in applying the defense.⁹⁷ The *Shihab* court allowed proof of *different*, although equally opprobrious, wrongdoings to establish the substantial truth defense.

In *Shihab*, a newspaper publisher claimed that one of his former journalists fabricated two particular articles.⁹⁸ The journalist brought a defamation action against his former employer.⁹⁷ The newspaper successfully defended the claim even though the publisher could prove only that the journalist fabricated a third article but not the two articles the publisher previously identified.⁹⁸

The *Shihab* court stated that the difference between the misconduct charged and the misconduct proved should be disregarded if no different effect is produced in the minds of the average reader or listener.⁹⁹ Using this interpretation of the substantial truth defense, the court found that no more opprobrium attaches to the fabrication of one newspaper article than would attach to the fabrication of a different article.¹⁰⁰ Furthermore, the court explained that the "gist" or "sting" of the accusation was the claim of fabrication, thus the allegation that the plaintiff fabricated two stories produced the same effect in the mind of the average reader as would a claim that plaintiff fabricated a third story, or a claim that plaintiff fabricated stories in general.¹⁰¹

The court noted that this result differs from the result that would be reached under the approach of Dean Prosser.¹⁰² Under the Prosser approach, the court stated, the

⁹⁵ This note labels this approach to applying the substantial truth defense the "*Shihab*" approach following the decision by the Texas Civil Court of Appeals in *Shihab v. Express-News Corp.*, 604 S.W.2d 204 (Tex. Civ. App. 1980).

⁹⁶ *Shihab v. Express-News Corp.*, 604 S.W.2d 204, 205-06 (Tex. Civ. App. 1980).

⁹⁷ See, e.g., *Downer*, 550 S.W.2d 744, 747; *Lundberg*, 66 S.W.2d 375, 376.

⁹⁸ *Shihab*, 604 S.W.2d at 205-06.

⁹⁷ *Id.* at 205.

⁹⁸ *Id.* at 206.

⁹⁹ *Id.* at 208. The court stated that:

The critical test should be whether the defamation, as published, would effect the mind of the reader or listener in a different manner than would the misconduct proved. If the effect on the mind of the recipient would be the same, any variance between the misconduct charged and the misconduct proved should be disregarded.

Id.

¹⁰⁰ *Id.* at 207.

¹⁰¹ *Id.*

¹⁰² *Id.* at 206.

substantial truth defense would not apply to situations similar to *Shihab* because the accusations of a different act would have a different effect on the mind of the reader.¹⁰³ The *Shihab* court, however, explained that this view of substantial truth sometimes leads to illogical results.¹⁰⁴ To illustrate this, the court used the example that if someone claimed that "X murdered A" or that "X is a murderer," the same effect is produced in the mind of the listener.¹⁰⁵ Under current interpretations of the defense, the *Shihab* court explained, in the first example the defendant would have to prove that X did murder A in order to establish the substantial truth of the statement, but the defendant could defend the second scenario merely by showing proof that X murdered anyone.¹⁰⁶ According to the *Shihab* court, however, proof that X murdered B should justify the statement that X murdered A, assuming that no special circumstances made murdering A more reprehensible than murdering B.¹⁰⁷ The *Shihab* approach thus reaches the correct result — that the identity of the murder victim is unimportant — by focusing instead on the effect of the concededly inaccurate statement on the mind of the recipient.

In summary, the substantial truth defense developed out of the early English common law actions of civil and criminal defamation. In its earliest application, the defense excused minor inaccuracies of expression because courts reasoned that such mistakes of insignificant detail made no difference to the average reader or listener. Some courts expanded the defense to include exaggerations of the details of misconduct. Courts concluded that details such as the value of stolen merchandise produced no different effect on the reader or listener. Rather, these courts noted, the defamatory effect resulted from the charge of committing the misconduct. More recently, the Texas Civil Court of Appeals established a broader approach, claiming that any differences between the misconduct charged and the truth should be ignored if there is no different effect in the mind of the average reader or listener. Instead of focusing on the statement's accuracy, this court stated, courts should focus on the statement's effect on the recipient. Today, all of these approaches to determining whether the substantial truth defense is applicable exist in the United States.

II. BROADENING THE APPLICATION OF THE SUBSTANTIAL TRUTH DEFENSE

The substantial truth defense to civil defamation charges had developed in a liberal manner. The reach of the defense has broadened from including such minor misstatements as incorrectly describing the color of a horse,¹⁰⁸ to including accusations of a different, although similar, bad act.¹⁰⁹ This latter approach to applying the substantial truth defense, recognized by the *Shihab* court, is a logical result of the historical expansion of the defense and should be uniformly adopted by all courts for at least two reasons.

¹⁰³ See generally PROSSER, *supra* note 1, at § 116.

¹⁰⁴ *Shihab*, 604 S.W.2d at 208.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See *id.* The *Shihab* approach is consistent with the approach taken by the Restatement (Second) of Torts. Even though the identity of the murder victim might be considered a significant detail, the Restatement only rejects the substantial truth defense where the misconduct is of a substantially different kind than the misconduct charged. See RESTATEMENT, *supra* note 3, at § 581A comment f.

¹⁰⁸ *Jackson v. Pittsburgh Times*, 152 Pa. 406, 25 A. 613 (1893). See also *supra* note 44 and accompanying text.

¹⁰⁹ See *Shihab*, 604 S.W.2d 204. See also *supra* notes 95–107 and accompanying text.

First, this expansion is significant in protecting important first amendment freedoms.¹¹⁰ A broad substantial truth approach safeguards these rights by protecting defendants who honestly make mistakes that cause no greater damage than the truth. Second, expanding the substantial truth defense to include inaccurate yet equally opprobrious actions is consistent with the substantive scope of the tort of defamation because it focuses on whether a challenged statement has damaged the plaintiff's reputation in the minds of readers or listeners. Thus, the necessity of maintaining strong first amendment freedoms and the recognition that a broad substantial truth defense is consistent with substantive law supports a broad application of the substantial truth defense.

Courts long have recognized the first amendment concerns that must be protected in defamation actions.¹¹¹ The Supreme Court has established the need to balance the individual's interest in guarding society's first amendment rights, especially the rights of freedom of speech and the press.¹¹² Although the Court has acknowledged the importance of a person's reputation, the Court nevertheless has emphasized that it is essential to protect the rights of the media.¹¹³

The Supreme Court has stated that the media serves two important roles in our society: it educates the population about current issues and events and also acts as a watchdog on the government.¹¹⁴ The Court has recognized that the media must be allowed some margin of error in reporting facts if it is to perform this function in society.¹¹⁵ The time pressures involved in rapidly disseminating large quantities of information make it impossible to avoid occasional mistakes.¹¹⁶ The Court has noted that without this margin of error in reporting information, the important roles of the media may be undercut because the media may resort to self-censorship out of fear of being unable to prove adequately the truth of every statement.¹¹⁷

The media's fear of self-censorship is not unfounded. The costs of defending a defamation action, as well as the risks of being unable to prove substantial truth under the current restrictive approaches, are great.¹¹⁸ In recent years, media defamation litigation has gained widespread attention both because of the staggering damages requested by plaintiffs and the equally staggering damages juries are willing to award.¹¹⁹ The natural bias of juries toward the individual and against the media render defamation

¹¹⁰ See, e.g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 152 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495, 497 (3d. Cir. 1978).

¹¹¹ See, e.g., *Pierce*, 576 F.2d at 496-97.

¹¹² *New York Times*, 376 U.S. 254. See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); *Butts*, 388 U.S. at 153.

¹¹³ See generally *New York Times*, 376 U.S. at 269-70.

¹¹⁴ See, e.g., *id.* at 269; *Roth v. United States*, 354 U.S. 476, 484 (1957).

¹¹⁵ E.g., *Butts*, 388 U.S. at 148; *New York Times*, 376 U.S. at 271-72.

¹¹⁶ *New York Times*, 376 U.S. at 271.

¹¹⁷ See *Butts*, 388 U.S. at 152; *New York Times*, 376 U.S. at 271-72, 279.

¹¹⁸ *Pierce*, 576 F.2d at 506-07.

¹¹⁹ See *Gertz*, 418 U.S. at 349; R. SMOLLA, *SUING THE PRESS* 3-6 (1986); Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 2-4 (1983) [hereinafter Smolla, *Let the Author Beware*]. In both of Professor Smolla's works, he lists actions in which plaintiffs sought large damage awards — in some cases, in excess of \$100 million. While judgments have not reached such heights, many awards enter the multi-million dollar range. *SUING THE PRESS*, *supra*, at 6. Furthermore, this trend in large damage awards is followed by a trend toward settling many defamation actions at great cost to the media. See Smolla, *Let the Author Beware*, *supra*, at 4.

defenses even more important to the media defendant.¹²⁰ A broad substantial truth approach would not only allow room for inevitable errors, but would help counteract the strong anti-media sentiment which promotes media self-censorship.

An expanded approach to applying the substantial truth defense also is supported by substantive defamation law; that is, the plaintiff should be compensated only if his or her reputation is damaged in the estimation of others.¹²¹ Thus, if the plaintiff's reputation is affected the same by the truth as by the challenged statement — even if the challenged statement imputes a separate act to the plaintiff — then no damages should be awarded.¹²² When courts first adopted the substantial truth defense, they were willing to assume that minor inaccuracies or exaggerations of the same act produced no different an effect on the mind of the recipient.¹²³ Because the focus is on the statement's effect on the recipient, however, the defense should be broadened to include any statements that produce the same effect as the truth. Therefore, the approach taken by the *Shihab* court, where somewhat different but equally opprobrious actions satisfied the defense, is consistent with substantive defamation law.

The development of the varying approaches to the substantial truth defense reflects a broadening scope to the defense. One hundred years ago courts were not willing to deviate far from the literal truth requirement.¹²⁴ While these courts did look to the defamatory effect of a statement, they focused more on the technical accuracy of a challenged phrase. The analysis of the defamatory effect of the challenged statement was merely a common sense conclusion that no one cared if a horse was white or bay for the purposes of defamation.¹²⁵ Likewise, misuse of technical terms, such as substituting larceny for burglary, fell under substantial truth protection because courts concluded that the distinction between the two terms was lost on the average person.¹²⁶

The exaggeration approach to substantial truth represents a more expansive view by courts than the slight inaccuracies interpretation of the defense. This approach examines more squarely the effect on the reader or listener. In a typical case, such as where a media account of a theft exaggerates the amount of money or goods taken, courts have found the more-than-slightly inaccurate description of the value unimportant.¹²⁷ The real sting of the defamation is the account of the arrest and the fact that the defamed person committed the bad act. The details about value do not affect the reputational damage created by the true information that the plaintiff committed the bad act.

The *Shihab* court's approach moves beyond the exaggeration standard because the court focuses less on the statement's technical inaccuracies and more on the statement's

¹²⁰ See Smolla, *Let the Author Beware*, *supra* note 119, at 4–7. Smolla discusses several studies conducted in the last decade on trends in defamation law. According to Professor Smolla, these studies show that juries were overwhelmingly more plaintiff-oriented than judges. *Id.* at 5. In fact, Professor Smolla noted that one study showed that appellate courts affirmed seventy-five percent of the appeals in favor of defendants. *Id.* at 5–6. Furthermore, in the majority of cases where a plaintiff's judgment was affirmed, appellate courts generally reduced the damage awards granted by the trial courts. *Id.* at 5.

¹²¹ See *supra* notes 3–7 and accompanying text.

¹²² See generally *Shihab*, 604 S.W.2d at 207.

¹²³ See *supra* notes 43–92 and accompanying text.

¹²⁴ See *supra* notes 43–48 and accompanying text.

¹²⁵ *Connor v. Standard Publishing Co.*, 183 Mass. 474, 477–78, 67 N.E. 596, 597 (1903).

¹²⁶ See *supra* text accompanying notes 53–54.

¹²⁷ See generally text accompanying notes 44–92 for a discussion of exaggeration cases.

effect on the minds of the readers or listeners.¹²⁸ This court carried the examination of the effect on the average reader or listener toward its logical conclusion; that is, if the statement's effect on the reader is the same, any difference between the literal truth and the inaccurate statement should be disregarded even if the action charged is different than the actual action and the statement is more than slightly inaccurate.

Although the *Shihab* court stated that it was following the exaggeration approach consistently used by Texas courts,¹²⁹ the facts of *Shihab* indicate that the court went beyond the typical exaggeration approach. According to the court, instead of exaggerating the details about a story the plaintiff did fabricate, the defendant in *Shihab* claimed that the plaintiff fabricated two totally different articles.¹³⁰ The court noted that the reasoning of the exaggeration cases did not necessitate a finding that the reach of the substantial truth defense is limited to misconduct included in the accusation.¹³¹ Thus, they concluded that similar misconduct outside of the accusation was included within the substantial truth defense.

The *Shihab* court's approach in including different acts under the substantial truth defense provokes two important questions: first, how different an action can be from the literal truth before it is no longer substantially true, and second, how the court can determine when the statement reaches this level of difference and has had a different effect on the mind of the average reader. The substantial truth defense should not be expanded to a point where a defendant could print any defamatory statement he or she wanted so long as he or she could provide proof of some equally opprobrious action. Rather, the defense should be limited by the constitutional rule that only accidental or negligent misstatements are protected.¹³² As the Supreme Court has reasoned, statements published with intentional or reckless disregard for truth or falsity deserve no protection under the first amendment.¹³³ Therefore, the substantial truth defense would be available only to defendants who unintentionally publish less than accurate, but not intentionally or negligently false, statements.

Courts are still left with the difficult question, however, of determining how different or inaccurate a statement can be before it is no longer substantially true. While this is an important point, there is always a question of how far any standard in the law can be pushed before it becomes unworkable. Obviously, no one would equate the sting of a false murder accusation with that of a true petty theft conviction. But can a distinction be drawn between a charge of rape and that of child molestation? The best people to draw this distinction and decide if these actions produce equal reputational damage are the average readers and listeners, the jury.¹³⁴

The media defendant generally raises the substantial truth defense on a motion for directed verdict or summary judgment.¹³⁵ There may be situations where the challenged

¹²⁸ See *Shihab*, 604 S.W.2d at 208.

¹²⁹ See *id.* at 206-07.

¹³⁰ *Id.* at 207.

¹³¹ See *id.* Further, the court pointed out that the decision of *Quaid v. Tipton* supports a holding that proof of different bad acts will raise the substantial truth defense. See *id.* at 207-08.

¹³² *New York Times*, 376 U.S. at 279-80.

¹³³ *Id.*

¹³⁴ See *supra* note 42. Courts already recognize that the question of a statement's substantial truth is best left to the jury except where the facts clearly indicate that summary judgment is appropriate.

¹³⁵ *E.g.*, *Fendler v. Phoenix Newspapers, Inc.*, 130 Ariz. 475, 478, 636 P.2d 1257, 1260 (Ariz.

statement is so close to the truth that the judge properly can decide whether the statement is substantially true. But because the defense turns on the effect on the average reader's mind, factual questions concerning any misstatements that move beyond a minor inaccuracy should be left for the jury.¹³⁶

The jury is the appropriate factfinder in this situation because the jury represents the average reader or listener. The jury is in the best position to determine whether the opprobrium attached to the alleged misstatement is similar to the opprobrium attached to the act actually committed. Each member of the jury can decide personally how he or she would react as an average recipient of the allegedly defamatory statement. While this may not be an easy task, juries often are called upon to make difficult factual decisions. Accordingly, it is well within the jury's ability to determine whether a different but equally opprobrious act has the same effect on the plaintiff's reputation as the truth.

In summary, a broad standard of substantial truth carries the examination of the defamatory effect on the reader or listener to its logical conclusion by allowing even different actions to fall under the substantial truth defense. Not only does a broad approach to the substantial truth defense aid in the essential maintenance of first amendment freedoms, but this approach is consistent with substantive defamation law. A broad approach is consistent with current law because a defamation action only provides recovery when a plaintiff has suffered actual reputational damage. If the plaintiff committed a bad act equally as opprobrious as the act charged, then no reputational damage has occurred and no damages should be awarded. The difficult question of determining the effect on a reader or listener can be handled by the jury, which best represents the average reader or listener.

CONCLUSION

The substantial truth defense developed out of early defamation law both from a recognition of the media's first amendment rights and a recognition that the media inevitably would make insignificant mistakes in publishing information. The first courts to apply the substantial truth defense determined that slight inaccuracies in immaterial facts would not affect the average reader or listener enough to render the statement false. As the defense developed, courts recognized that the defamatory "sting" of a statement lay in the charge of misconduct, for example, stealing, and not in such inaccuracies as the exaggerated description of the value of stolen goods. More recently, the *Shihab* court correctly broadened the substantial truth defense by claiming that any differences between the misconduct charged and the truth should be ignored if the inaccurate statement produces the same effect as the literal truth in the mind of the recipient.

This note urges that all courts adopt the approach to substantial truth taken by the *Shihab* court. This approach would encompass situations involving slightly inaccurate or exaggerated facts recognized under the current approaches as well as include situations

Ct. App. 1981); *Hovey v. Iowa State Daily Publications Bd., Inc.*, 372 N.W.2d 253, 256 (Iowa 1985); *Jadwin v. Minneapolis Star & Tribune Co.*, 390 N.W.2d 437, 443 (Minn. App. 1986). Because the establishment of the substantial truth defense precludes examination of constitutional actual malice concerns, see *supra* note 34, the defendant has incentive to raise this defense on a motion for directed verdict or summary judgment.

¹³⁶ This result comports with current defamation law. See *supra* note 42 and accompanying text for a discussion of how the question of substantial truth is generally one of fact for the jury.

involving separate actions imputed to plaintiffs. The *Shihab* approach helps protect essential first amendment freedoms by providing the media with "breathing space" to publish occasionally inaccurate information. This approach also is consistent with the policy behind defamation law because it awards damages to plaintiffs only when the inaccurate statement produces more reputational damage than would the literal truth. The judicial system already provides an answer for the difficult question raised by the *Shihab* approach; that is, how the factfinder will be able to decide whether a reader or listener is affected differently by a challenged statement. The jury, which best represents the average reader or listener in our judicial system, can best decide how far a statement may deviate from the truth and still remain substantially true.

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