Snakes, Bananas and Buried Treasure: The Case For Practical Jokes

David Cohn*
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Abstract

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"Frame your mind to mirth and merriment Which bars a thousand harms and longness life."

- William Shakespeare, The Taming of the Shrew

I. INTRODUCTION

We all appreciate a good joke. Humor is good for the soul. A well-executed practical joke provides the greater thrill of all. To everyone, that is, save the victim. Most practical joke victims take their humiliation in stride. They laugh along with the others, knowing that sooner or later they will exact revenge.

Occasionally, however, a brilliantly planned scheme goes awry. The victim, failing to find the joke funny, refuses to laugh. Or worse, he brings suit. The courts must then become the arbiters of comedic value. When is a joke funny? When does it constitute actionable conduct? And when does it simply make a mockery of the legal system? Such problems arise when the courts encounter the blurry line between joke and sort.

For decades, the courts have debated a plethora of practical joke issues. Astonishingly, little has been written on the subject. No casebook exists on the law of humor, and no commentator has directly addressed practical joke jurisprudence. This gap in legal scholarship must be filled. So let us begin.

II. ANALYSIS OF CASE LAW

A. In Search of Buried Treasure

The year is 1928. The place is the old South. Imagine, if you will, a Justice on the Louisiana Supreme Court pressed with the facts of...
Nickerson v. Hodges, which follow. The petitioners are the heirs of the late Carrie E. Nickerson (Miss Nickerson). Miss Nickerson brought the original suit against the respondents/perpetrators seeking $15,000 in damages for financial outlay, loss in business, mental and physical suffering, humiliation, and injury to reputation and social standing. Plaintiff, gad-digging Miss Nickerson, had previously visited a fortune teller who informed her that her relatives had buried a pot of gold. Miss Nickerson received a map showing the supposed location of the treasure and began digging (with the help of a few relatives). Defendants Minnie Smith, William "Bad" Baker, and H.R. Hayes, annoyed by the treasure hunt, decided to intervene in the name of humor. As an April Fool's joke, they buried a sealed bucket containing rocks and dirt near the site of the dig. They attached a predated note directing the finder of the pot "not to open it for three days and to notify all the heirs." They then waited for the hunters to take the bait.

The joke did not go off as planned. Miss Nickerson did not discover the bucket until April 14th. Believing she had recovered the lost treasure, she followed the terms of the note diligently. Miss Nickerson deposited the pot at a bank for safe-keeping during the three day waiting period. She then summoned the relatives. When the bucket was uncovered and its contents revealed, Miss Nickerson flew into a rage. She suffered extreme humiliation and "carried to her grave some two years later [the conviction] that she had been robbed."

Miss Nickerson obviously did not find the joke funny. Neither did the court, as it awarded her heirs $500 in damages. The court noted that: "If Miss Nickerson were still living, we should be disposed to award her damages in a substantial sum, to compensate her for the wrong thus done."  

1. 84 So. 3rd (La. 1920).
2. We must not underestimate the importance of social standing in the old South. See Tennessee Williams, A STREETCAR NAMED DESIRE. While courts today may not entertain such a theory of tort liability, this commentator finds it funny and thus relevant.
3. Nickerson, 84 So. at 38.
4. Miss Nickerson, a 45-year-old "nabob," had spent time in an insane asylum twenty years earlier. Id. The legal ramifications of this point are uncertain. Should we hold perpetrators to a different standard if the victim is mentally unstable? Is it overly cruel to play jokes on the emotionally fragile? Perhaps this calls for an adaptation of the "this skull and skeleton to me he has an eggshell skull, am I liable for murder? What is the mens rea?"
5. Id. at 39.
6. Id.
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6. Id. at 39.
7. Id. at 39.
8. Id. at 39.
9. Id. at 39.
10. Id. supra note 8, at 16.
11. Id. at 17.
12. Surprise, surprise!
13. Id. supra note 8, at 21.
a Halloween mask. King stopped at Conner's post, and Conner stood at King but failed to acknowledge the joke. Frustrated by this lack of attention, King returned later and told Conner "to release the dumping latch on his truck quickly or else he would 'put his friend' on her." Conner refused to cooperate, at which point King brandished a large snake and began chasing Conner. Conner finally gave up the chase and threw the snake at the frightened victim. Conner ran until she collapsed, left work for the day, and was treated for dizziness and a headache. The snake suffered no serious injuries.

Conner sued Magic under a respondent superior theory, claiming that King's boss had ratified the activity by failing to intervene. Conner introduced evidence that King's superior laughed during the incident. So did the Supreme Court of Alabama. Without dissent, the court dismissed the suit stating: "Proof of laughter, under such bizarre circumstances, is legally insufficient proof of ratification." Score one for humor.

The second case is Temp Tech Industries, Inc. v. National Labor Relations Board. Temp Tech involves an attempt to recover attorney's fees under the Equal Access to Justice Act. The crux of this case, at least for our purposes, lies in an unpeeled banana. Temp Tech dismissed striking employee Bernard "Banana" Szolko for loitering another employee on the picket line. Szolko pushed a softened, unpeeled banana in the face of a nonstriking employee as that employee crossed the picket line. Szolko maintained his innocence and claimed that he was engaging in a practical joke. After all, the "banana in your face" joke has a long and storied history, beginning with Darwin and his happy apes. But the Administrative Law Judge did not agree and upheld Szolko's dismissal.

15. This fact appears in the opinion but is unnecessary. Nor does the court describe the precise nature of the mask. I find this omission most irresponsible on the part of the Alabama Supreme Court. Entire joke theories could rest on what character King was impersonating. Certainly Fawcett would find this information essential.
17. Id.
18. Id. at 391.
19. Id. at 392.
20. 756 F.2d 390 (7th Cir. 1985).
22. Temp Tech, 756 F.2d at 390.
23. Id. In general, will continue to use footnotes to point out tangential humorous issues.
24. Temp Tech. 756 F.2d at 390.
25. Id.
27. Id. at 1012.
28. This phrase could well make Hall the practical joke equivalent of Cohen v. California, in which the Supreme Court ruled that the phrase "Fuck the Draft" did not
a Halloween mask.\textsuperscript{15} King stopped at Conner's post, and Conner stared at King but failed to acknowledge the joke.\textsuperscript{16} Frustrated by this lack of attention, King returned later and told Conner "to release the dumping latch in his truck quickly or else he would 'put his friend on' her."\textsuperscript{17} Conner refused to cooperate, at which point King brandished a large snake and began chasing Conner. Conner finally gave up the chase and threw the snake at the frightened victim. Conner ran until she collapsed, left work for the day, and was treated for dizziness and a headache.\textsuperscript{18} The snake suffered no serious injuries.

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\textsuperscript{16} Conner, 592 So. 2d at 1049.

\textsuperscript{17} Id.

\textsuperscript{18} Id. at 1051.

\textsuperscript{19} 766 F.2d 506 (7th Cir. 1985).


\textsuperscript{21} Temp Tech, 766 F.2d at 506.

\textsuperscript{22} Temp Tech, 766 F.2d at 506.

\textsuperscript{23} I definitely will continue to use footnotes to point out egregious humor issues.

\textsuperscript{24} Szkolny claimed that his activity was protected under § 8(a)(1) and (3) of the National Labor Relations Act ("NLRA"). 29 U.S.C. § 158(a)(1) and (3) (1982). Sections 8(a)(1) and (3) of

\textsuperscript{25} I do not, of course, wish to impugn the integrity of construction workers as a whole. They fix

\textsuperscript{26} Id. at 1052.
The court found that these incidents (and other more serious infractions) constituted sexual harassment. Let us suppose, however, that the three actions listed above were the only contested conduct. Are any of them humorous enough to deserve protection?

Freud would say that the men are releasing their sexual frustrations on the women. Hobbes would call it an exercise in power. Feminists may argue that the power and sexual elements combine to make this rape. Objectivists may argue that the world is a jungle and the women should fight back with jokes of their own. Stoics would say turn the other cheek.

The male perpetrators here are certainly testing the tolerance of even the most comedic aficionados. To lovers of cutting-edge humor, the "Herpes" joke may actually be funny. Abusive nicknames form a venerable tradition in the humor business. Al Capone had to live with the name "Scarface," which in the 1920s may have just been as embarrassing. Manuel Noriega is often called "Pineapple Face." Ross Perot is compared to Dumbo. So why not "Herpes?" Still, sexually explicit nicknames should be subject to strict scrutiny. If no harm is intended, we can all have a laugh. But if the nickname is malicious, perhaps the jokester should be subject to liability.

The other instances hardly merit in-depth discussion. The "fucking flag girls" line has no comic value (this one doesn't even purport to be a joke) and thus deserves no protection. And urinating in the gas tank is just too strange. These men should find (1) a toilet and (2) a Freudian therapist.

D. Over the Line

Occasionally, a jokester clearly crosses the line into the world of tort. Caudle v. Betts presents such a case. Defendant/perpetrator/falsehood Peter Betts, principal shareholder of Betts Lincoln-Mercury in Alexandria, Louisiana, thought he had a great idea for a practical joke. Betts took a charged automobile condenser, which delivers an electric shock when touched, and "shocked the back of plaintiff/victim car salesman Ruben Caudle's neck with the charged condenser and chased Caudle with it until he escaped by locking himself in an office." Caudle suffered damage to the occipital nerve and experienced frequent headaches and fainting spells, which required surgery to alleviate. He sued Betts for damages, and the perpetrator defended claiming he had played a practical joke on his employee and had "intended to shock Mr. Caudle but did not intend to injure him beyond a momentary, unpleasant jolt." The court wisely rejected this theory and found for Caudle.

E. Conspiracy in the Courtroom

Even courts attempt humor from time to time. Judges are often stereotyped as serious, stodgy figures. But experience shows otherwise. Take the case of Drayton v. Hayes. During the trial, Judge Held asked Assistant District Attorney Kenneth Ramsaur to help play a joke on defense counsel Frank Markus. After Held informed counsel that no further witnesses would be called, the Judge, Ramsaur, and the court reporter instigated the joke. When Markus returned to the courtroom for closing arguments, Ramsaur rose to call several rebuttal witnesses. The court reporter pretended to record the proceedings. Markus rose to object and argued for several minutes, until Held advised him to "sit down and relax."

constitute fighting words. 403 U.S. 15 (1971). Since then, every legal scholar and law student wishing to throw the word "fuck" into an academic paper has cited this case. I now join their ranks.

29. Id. at 390.
30. Yes, another tangential issue. What do you expect, humor law is complex!
McKinney v. Dole considered the question of whether calling the plaintiff "Buffalo Butt" was enough to charge the defendant with sexual harassment. 765 F.2d 1129 (D.C. Cir. 1985). While the nickname may be cruel, wouldn't the discerning observer at least give the jokester credit for creativity? And if we do not allow offensive jokes, what good is humor anyway?
because it was all a joke.\textsuperscript{37} Markus later moved for a mistrial claiming that the hoax had "unerved" him and caused him to deliver an ineffective closing argument.

The Drayton court rejected Markus' appeal citing a lack of bad faith on the part of Held. Despite finding the joke in "poor taste," the court noted that "Held was [not] motivated by a desire to prejudice or harass Mr. Markus and his client."\textsuperscript{38} But has the Second Circuit gone too far in allowing courtroom jokes? Snakes and bananas in the work-place seem funny enough, but trials are supposed to be serious. Does Drayton make a mockery of the judicial system? Or is it a welcome breath of fresh air? What should be our standard for judging practical jokes?

III. TOWARD A THEORY OF PRACTICAL JOKE JURISPRUDENCE

This controversy demands a resolution in the form of a coherent national standard. Beauty may be in the eye of the beholder, but funny should be a matter of law. I offer several standard policy arguments in support of this proposition:

* Judicial Economy: The courts are overloaded with cases, including joke cases. Until we pass tort reform measures, unimpressed victims of practical jokes will continue to flood the judicial system with suits. A national standard for practical joke cases will allow speedy resolutions to these claims.

* Fear of Forum Shopping: If, for instance, Alabama is known to be tough on practical jokers while California allows great latitude, victims will attempt to flood the Alabama courts with joke cases. Also, it is simply unfair to hold jokers to a higher standard dependent solely on where they perpetrare their scams. A joke is a joke is a joke, whether devised in Florida, Alaska, Hawaii, or on the moon.\textsuperscript{39}

* Efficiency: A national standard would eliminate haggling over the proper degree of protection afforded practical jokes. The courts could then waste

\textsuperscript{37} Id. at 119.

\textsuperscript{38} Id. at 122.

\textsuperscript{39} There are, to the best of my knowledge, no reported cases of practical jokes carried out on the moon. Readers should interpret the phrase as it is mere rhetorical hyperbole.
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C. Lighten Up, Please!

This test is simple and intuitive. A joke receives protection if the natural reaction by onlookers to a victim's outrage would be "lighten up, please!" The test, which would protect the perpetrators in Nickerson, Temp Tech, and Conner and punish those in Hall and Caudle, provides a nice compromise. (Drayton remains a judgment call based on one's opinion of courtroom etiquette. Personally, I find the episode funny and extremely creative. We need more judges like Judge Held.) The objectivity of the process is maintained as the standard of onlookers rather than perpetrators or victims. More important, this test allows peers of the parties to arbitrate rather than members of the cultural elite. This is essential to preserving the integrity of the process in a democracy. Besides, we need to take some of the pseudo-scientific seriousness out of judging. To all those self-important policy geeks who present intricate theories to answer every conceivable question, I have three words: Lighten up, PLEASE!

All you earnest young men out to save the world... please, have a laugh.

- Reinhold Niebuhr

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Syllabus

Dan McGurn

Lawyering and Society Winter 1993
Nuevo University-Rocco Baldini Law Center

1 Credit: Open to third year students and second year females with permission.

Instructor: Adjunct Professor Seamus Vytautas McCheese, IV (recognized by my unvarying uniform of polo shirt, Docker's, brand-spanking-new "pump" athletic shoes, and nose-ring).

Office Hours: Mondays 8:00 to 8:15 a.m. or by appointment. Or just drop by anytime my door is closed.

Class Times: In months that begin with a consonant, class meets Mon. at 10:00 a.m. in LL; Wed. at 10:15 a.m. in C2; Fri. at 10:05 a.m. in the Atrium. In months that begin with a vowel, class meets Tues. at 9:50 a.m. in LL; Thurs. at 9:15 a.m. in LL; Fri. at 9:15 p.m. at The Parrot. (Legislative Days will be ignored completely.)

Required Texts:

1. The Law Firm, by that guy, paperback $9.95.

2. Lawyering and Society Supplement, Volumes 1-4, by McCheese, may be purchased at Nuevo Cashcow Bookstore after credit check, signing of Promissory Note, and filing of UCC-1 Financing Statement and with Florida Secretary of State. Price is negotiable.


* Dan McGurn has great hopes to be a law school professor. If he achieves this goal, he intends to make use of this syllabus.