

The State of South Carolina



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The Honorable Joyce C. Hearn  
Member, House of Representatives  
404C Blatt Building  
Columbia, South Carolina 29205

Dear Representative Hearn:

You have asked on behalf of your constituent that this Office comment as to whether our laws prohibiting indecent exposure may be applied to the situation where a waitress in a restaurant, club or other public place appears "topless" as part of her job function.

In an opinion of this Office, Op. No. 3165, dated August 12, 1971, this question was examined in detail. There, it was concluded that § 16-15-130 of the Code, which proscribes "wilful and malicious indecent exposure ... in any public place ...", could be deemed applicable to the "topless" waitress situation, if the elements of the offense are proven beyond a reasonable doubt. The opinion concluded that in order to constitute a violation of § 16-15-130,

... there must be (1) an indecent exposure of one's person (2) in a public place, on property of others or to the view of any person on any street or highway and (3) such exposure must be wilful and malicious rather than accidental or inadvertant.

The opinion further concluded that

Clearly, a restaurant, night club or bar would be a "public place" within the meaning of the statute and this would seem to be so whether labeled "private" for purposes of liquor licensing. Moreover,

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indecent exposure by a female on property other than her own would come within the statute's prohibition thus avoiding the "private v. public" controversy.

As noted above, the opinion also stated that § 16-15-130 required that "the indecent exposure must be wilful and malicious." It noted that "[w]ilful of course means intentional rather than the result of accident or inadvertence." While the opinion commented that "[m]alicious has been defined as 'done with wicked or mischievous intentions or motives'", it was further stated that

[m]alice is defined as an "intent to commit an unlawful act or cause harm without legal justification or excuse."

From your letter and the letter of your constituent, it appears that there may be confusion as to the requirement in § 16-15-130 that the indecent exposure must have been done "willfully and maliciously". Our Supreme Court has noted that the terms "willful" and "malicious" are not synonymous. State v. Toney, 15 S.C. 409, 412 (1881). However, while the terms may have different meanings, the fact that the § 16-15-130 further requires that the indecent exposure must have been done "maliciously" does not mean that there must be proven actual wickedness or a depraved heart in order to convict under the statute. I will explain this more fully below.

Our Supreme Court has consistently recognized the difference between the use of the term "malice" or "malicious" in its popular sense and in its legal sense. In Margolis v. Telech, 239 S.C. 232, 122 S.E.2d 417 (1961), the Court noted that in legal usage, the term malice means the deliberate, intentional doing of a wrongful act without just cause or excuse. In State v. Howell, 162 S.C. 394, 160 S.E. 742 (1931) it was stated that the "very essence of malice is that the wrongful act must have been done intentionally and without just excuse. The Court, in State v. Heyward, 197 S.C. 371, 15 S.E.2d 669, 671 (1941) elaborated upon the legal and popular definitions of malice:

In its popular sense, the term "malice" conveys the meaning of hatred, ill will, or hostility toward another. In its legal sense, however, ... it does not of necessity import ill will ... but signifies rather a general malignant recklessness of the lives

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and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief.

And in State v. Ferguson, 91 S.C. 235, 243, 74 S.E. 502 (1911), the Court again made the point, noting the "difference" between the popular and legal meaning of the word "malice".

... [A] man's heart may be full of sin ... yet, unless it prompts "the wilful or intentional doing of a wrongful act, without just cause or excuse," it is not a legally malicious heart.

In several cases, the Court has also noted that malice may be implied from the surrounding circumstances. With respect to malicious mischief, the Court noted in State v. Davis, 88 S.C. 229, 238, 70 S.E. 815 (1911) that it was not necessary to show personal ill will. Instead,

Malice as an ingredient of the offense may be inferred from the wilful doing of an unlawful act without just cause or excuse, and both wilfulness and malice may be inferred when the unlawful act is done in such a wanton and reckless spirit as to show a mind disposed to mischief.

Moreover in State v. Mouzon, 231 S.C. 655, 663, 99 S.E.2d 672 (1957) the Court quoting from State v. Trott, 190 N.C. 674, 130 S.E. 627 (1925) stated that in the context of murder,

Malice does not necessarily mean an actual intent to take human life. It may be inferential or implied, instead of positive, as when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life.

I believe these cases provide a useful point of reference in determining whether the element of malice is met. For purposes of the indecent exposure statute, the malice requirement contained in the statute would be met if there is no legal justification or excuse for the exposure and such exposure is done so recklessly or wantonly as to show a depravity of mind and disregard of others. As with any other offense involving malice this could be inferred from the surrounding facts and

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circumstances. Such would, of course, ultimately be a question for the jury; however, a jury could consider facts such as the degree of exposure, the regularity and duration of the exposure, the likelihood of exposure to others, the actual state of mind of the offender, monetary gain etc. While again, each case would turn on its own facts, it is certainly possible that the act of appearing "topless" as a waitress in a restaurant or bar could constitute the offense of indecent exposure pursuant to § 16-15-130.

If I can be of further assistance, please let me know.  
With kindest regards, I remain

Very truly yours,



Robert D. Cook  
Executive Assistant for Opinions

RDC/an

cc: Mrs. Julie Forbes Lybrand