Loyola University Chicago Law Journal

Volume 7
Issue 3 *Summer 1976*

Article 3

1976

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Evening The Odds In Defamation—*Troman v. Wood*

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From the inception of this country the law of defamation had developed almost exclusively as a matter of state law.[1] Only infrequently did the federal courts become involved in defamation cases other than those which were heard pursuant to diversity jurisdiction.[2]

Suddenly, in *New York Times Co. v. Sullivan*,[3] the United States Supreme Court discovered that the first amendment to the United States Constitution limited defamation law as it had been developed by the states. The Court there fashioned a federal rule that

> prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[4]

Having entered the field, the Court found that it had spawned more questions than it had clarified. The Court was called upon again and again to clarify issues arising from the seminal *New York Times* ruling. Its struggle to answer these questions seemed destined to culminate in complete federalization of the law of defamation, at least insofar as it applied to the news and broadcast media. Thus, the *New York Times* rule was extended to "public figures," *i.e.*, persons who, either as a result of their status, or their activities, had thrust themselves into the vortex of public discussion and were, therefore, subject to open criticism of their actions and attitudes.[5]

The states followed the lead of the United States Supreme Court in the defamation area. The Illinois Supreme Court, in fact, presaged the next ruling rendered by the Supreme Court. In *Farnsworth v. Tribune Company*,[6] a physician sued defendant newspaper for a series of articles accusing her of being a "quack." Relying upon the

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1. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250 (1952).

2. One example of federal entry into the field is Near v. Minnesota, 283 U.S. 697 (1931), where it was held that free speech could not be subjected to prior restraint.

3. 376 U.S. 254 (1964).

4. *Id.* at 279-80.

5. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

6. 43 Ill. 2d 286, 253 N.E.2d 408 (1969).

Supreme Court decisions of *New York Times* and *Curtis Publishing Co. v. Butts*,[7] the Illinois Supreme Court held that it was not the status of the plaintiff which triggered the applicability of the constitutional rules, but rather whether a public issue was involved. If the subject of the article under attack was of sufficient public interest, the notoriety of the plaintiff was immaterial.[8]

The United States Supreme Court confirmed the *Farnsworth* result in *Rosenbloom v. Metromedia, Inc.*,[9] a plurality opinion by a severely divided Court, which extended the *New York Times* rule to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.[10] This conclusion was based upon the rationale that "we are all 'public' men to some degree."[11]

Within a short time, a majority of the Supreme Court Justices recognized, for the first time, in *Gertz v. Welch*,[12] that "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."[13] Perhaps weary of deciding close questions fraught with first amendment implications in this area, the Court merely provided the outer parameters of first amendment protection afforded defendants:

> . . . so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.[14]

The Court went on to hold that "the states may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."[15]

In *Gertz*, the United States Supreme Court returned to the individual states responsibility for decisions which it had for a time preempted to itself. In *Troman v. Wood*,[16] the Illinois Supreme Court responded to that delegation of authority and set forth rules applicable to defamation actions between private individuals and the media.

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7. 388 U.S. 130 (1967).
8. *Id.* at 290-92, 253 N.E.2d at 411-12.
9. 403 U.S. 29 (1971).
10. *Id.* at 44.
11. *Id.* at 48.
12. 418 U.S. 323 (1974).
13. *Id.* at 345-46.
14. *Id.*
15. *Id.* at 348-49.
16. 62 Ill. 2d 184, 340 N.E.2d 292 (1975).

Plaintiff in *Troman* filed suit as a result of a newspaper article which appeared in the *Chicago Sun Times*. This article contained a photograph which implied that plaintiff's home was the headquarters of a youth gang on the north side of Chicago which had been implicated in various criminal activities in the neighborhood.

The trial court, in an unreported opinion, dismissed the case.[17] While recognizing that the Supreme Court in *Gertz* had relegated to the states the determination of the standard of liability in cases involving private citizens, the trial court ruled that plaintiff was required to plead and prove actual malice—the *New York Times* standard. The court noted that *Farnsworth* had been decided prior to *Rosenbloom*, and was still persuasive authority in Illinois. The court went further, however, deciding that the actual malice standard served both the objective of redressing untrue facts and the objective of fulfilling the community's right to a free exchange of matters of general public interest. The court also noted that negligence seemed an inappropriate standard for the intentional tort of libel.[18]

The Illinois Supreme Court, on direct appeal, reversed, holding that in a suit brought by a private individual to recover actual damages for a defamatory publication whose substantial harm to reputation is apparent,

> recovery may be had upon proof that the publication was false, and that the defendant either knew it to be false, or, believing it to be true, lacked reasonable grounds for that belief. We further hold that negligence may form the basis of liability regardless of whether or not the publication in question related to a matter of public or general interest. Our holding in the present case is, of course, not intended to remove any of the absolute or qualified privileges which have heretofore been recognized in this State to the extent that the facts may warrant their application.[19]

The court reasoned that the actual malice standard was not justified by overriding Illinois public policy, stating that "prior to *New York Times* it was not considered that liability for defamation required any showing of fault at all, let alone proof of actual malice."[20]

The *Troman* court also found support for its decision in the Illinois Constitution. The court emphasized provisions concerning the recognized interest of an individual in his reputation and stated:

17. Troman v. Wood, No. 74 L 13839, Circuit Court of Cook County (Feb. 7, 1975).
18. *Id.*
19. 62 Ill. 2d 184, at 198, 340 N.E.2d 292, at 299 (1975).
20. *Id.* at 194, 340 N.E.2d at 297.

> Moreover, the constitutions of this State have from the outset recognized as fundamental the rights of "enjoying and defending life and liberty, and acquiring, possessing and protecting property and reputation." (Const. of 1818, art. VIII, sec. 1.) From the outset it has been recognized that an individual is entitled to a remedy "for all injuries and wrongs that he may receive in his person, property or character." (Const. of 1818, art. VIII, sec. 12; Const. of 1848, art. XIII, sec. 12.) (In the most recent constitutions the word "reputation" is substituted for "character". (Const. of 1870, art. II, sec. 19; Const. of 1970, art. I, sec. 12.) The freedom of speech provisions of both our former and present constitutions (Const. of 1870, art. II, sec. 4; Const. of 1970, art. I, sec. 4) recognize the interest of the individual in the protection of his reputation, for they provide that the exercise of the right to speak freely shall not relieve the speaker from responsibility for his abuse of that right.[21]

The court recognized that the individual has an interest in preserving and restoring his reputation through an authoritative determination. "To foreclose or restrict the availability of the judicial process as a means of securing such a determination prevents the individual from obtaining the effective vindication to which he is entitled."[22]

Rejecting the reasoning which it had used in *Farnsworth*, the court criticized the use of "matters of public interest" as a criteria for determining the scope of protection to be afforded a defamation defendant. It determined that the use of such a standard would to a great extent allow a potential defendant to create its own immunity, since "whether a matter is one of public interest, moreover, depends to some degree on whether the media themselves have chosen to make it one."[23] Recognition was also accorded to the possibility that an article dealing with a matter of public interest might include a patently defamatory statement which was not, in and of itself, an item of public interest. In such a situation, "[a] court would then find itself enmeshed in difficult attempts to determine whether the defamatory statement was germane to the main thrust of the article."[24]

In reaching its decision, the court rejected alternative standards of liability suggested by defendants. Gross negligence or wilful and wanton misconduct was rejected on the ground that the already

21. *Id.* at 194-95, 340 N.E.2d at 297.
22. *Id.* at 195, 340 N.E.2d at 297.
23. *Id.* at 196, 340 N.E.2d at 297.
24. *Id.* at 196, 340 N.E.2d at 298.

complex law of defamation "would not profit by the introduction of a distinction based upon differing degrees of fault."[25] The standard of "journalistic malpractice" was rejected on the ground that such would allow the newspapers in the community to establish their own standards of care, which would tend toward a progressive depreciation of the standard of care used.[26]

The Illinois Supreme Court has sought to reconcile the interests of private citizens in the protection of their right of privacy, with the interest of the press to inform the public of matters upon which it has the right to be informed. The balance struck here is not unfair to the press. As a result of the development of the law of defamation within the past few years, the press has obtained a great deal of protection which it did not previously possess. It still has all the common law privileges which it always had, *e.g.*, absolute privilege to print official proceedings and qualified privilege of fair comment and criticism. The burden of proving the truth or falsity of the factual material has been shifted from defendant to plaintiff.[27] The plaintiff will be entitled to obtain only actual damages upon the showing of mere negligence; if he desires to obtain punitive damages, he must now show actual malice in the *New York Times* sense.[28]

The standard of probable cause to believe that the material printed is true, adopted by the Illinois Supreme Court, is a standard familiar to the courts. It is identical to that standard applied to searches and seizures under both the fourth amendment of the United States Constitution and article I, section 6 of the Illinois Constitution. Under this standard, a defendant need not prove the absolute truth of the material which he has printed, but only that he had some reasonable ground for believing it to be true, such as that it was obtained from a trustworthy source. Furthermore, the burden of proving that defendant lacked reasonable grounds for believing the information to be true is placed upon plaintiff.

The result of these developments in the law of defamation, as culminated in the *Troman* decision, is to remove the absolutes in the relationship between the private individual and the press, insofar as defamation is concerned. In effect, all defamation suits brought against the press in Illinois are governed by the common

25. *Id.* at 197, 340 N.E.2d at 298. Similarly, the Illinois Supreme Court has refused to adopt the standard of comparative negligence in personal injury cases. Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968).

26. 62 Ill. 2d at 197-98, 340 N.E.2d at 298.

27. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

28. Gertz v. Welch, 418 U.S. 323 (1974).

rules applicable to that group of libels previously known as libel *per quod*. As in that situation, the burden is on the plaintiff to prove actual fault and actual damage.

Of course, in this case as in all seminal decisions, questions remain that will undoubtedly spawn further litigation. In speaking of the kinds of words for which defendants would be liable in the future, the court used the phrase "publication whose substantial danger to reputation is apparent."[29] What, if anything, does this presage in regard to the categories of statements traditionally held to be defamatory *per se*? Perhaps no change was contemplated, for the court specifically referred to "defamatory" publications. Certainly a review of the Illinois Supreme Court's decisions in libel and slander actions throughout the years would indicate no tendency to drastically rewrite the law of defamation, except where mandated by United States Supreme Court decisions.

Another issue, bound to arise in the future, is referred to, but not decided in the *Troman* opinion: what is the result where a newspaper does conduct an investigation into a fact situation and discovers disagreement regarding the facts? Does the fact of such an investigation insulate the defendant from liability? Is a newspaper reporter entitled to believe information given to him by an informant, or must he also vouch for the credibility of such an informant? Stated alternatively, what type of verification, if any, must a newspaper reporter obtain before relying upon an informant's tip in writing a story? The Illinois Supreme Court merely expressed its confidence in the ability of the trial judge to frame suitable instructions which would prevent the jury from confusing the issues of truth or falsity of the information with the adequacy of the defendant's investigation.[30]

Finally, with *Troman*, the Illinois Supreme Court has joined a slight majority of the states which have decided the issue since *Gertz*. Kansas,[31] Massachusetts[32] and Ohio[33] courts have set forth a negligence standard essentially similar to that announced in *Troman*. Indiana[34] and Colorado,[35] on the other hand, have opted for

29. Troman v. Wood, 62 Ill. 2d 184, 198, 340 N.E.2d 292, 299 (1975).

30. *Id.* at 197, 340 N.E.2d at 298.

31. Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975).

32. Stone v. Essex County Newspapers, Inc., 330 N.E.2d 161 (Mass. 1975).

33. Thomas H. Maloney & Sons v. E.W. Scripps Co., 43 Ohio App. 2d 105, 334 N.E.2d 494 (1974), *cert. denied*, 44 U.S. L.W. 3198 (Oct. 7, 1975).

34. AAFCO Heating and Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580 (Ind. App. 1974).

35. Walker v. Colorado Springs Sun, Inc., 538 P.2d 450 (Colo. 1975), *cert. denied sub nom.*, Woestendiek v. Walker, 44 U.S. L.W. 3342 (Dec. 9, 1975).

the actual malice standard of *New York Times* for cases dealing with matters of public interest, although it should be noted that the decision of the Indiana court was based upon the Indiana Constitution. New York has adopted yet a third approach, allowing recovery only upon a showing of "grossly irresponsible" actions on the part of defendant.[36]

Troman's requirement that the press act responsibly and carefully is not unduly harsh; to hold otherwise would be to strip citizens of their right to privacy. An individual who lives remote from the public light has no recourse other than through the courts to clear his name. Unlike a public official or public figure, he has no access to the news media wherein he can rebut defamatory statements made against him. A good reputation, fragile as well as valuable, may be destroyed in an instant by a thoughtless word or comment broadcast to the public. A rumor, once begun, is often impossible to inhibit, manifesting effects all-pervasive and often indelibly imprinted upon public awareness. Some reasonable means of redress is therefore mandated. The Illinois Supreme Court has provided this means through the adoption of a negligence standard in defamation cases involving private individuals defamed by the news or broadcast media.

36. Chapadeau v. Utica Observer-Dispatch, 38 N.Y.2d 196, 341 N.E.2d 569 (1975).