Chicago-Kent Law Review

Volume 43 | Issue 1 Article 12

April 1966

Truth as a Defense

B. Sidler

by publishing his denial and making the charges without investigation when they could have investigated. The court also noted that the matter was handled all out of proportion to any news value. This conclusion was reached by considering the amount of space used, the size of the print, and the use of bold face print in parts. The court in conclusion summed up its process for determining whether actual malice is present by saying all circumstances surrounding the transaction are proper for consideration.[83]

RONALD R. EVANS

TRUTH AS A DEFENSE

In almost all jurisdictions a defendant in a civil action for defamation, is excused from liability if he can prove the truth of his defamatory statements.[1] In Illinois, however, the relevant constitutional provision includes additional language which has been interpreted as narrowing the old common law rule that truth is a perfect defense by adding the requirement that "the truth, when published with good motives and for justifiable ends, shall be a sufficient defense."[2] To what extent this additional language has actually affected the law of defamation in Illinois will be considered below in the section on "Good Motives and Justifiable Ends." But first, let us assume that a defendant wishes to utilize the "truth" defense, and that he can justify his motives and his ends after he has proven that he has told the truth.

Several questions arise with respect to the truth defense which are not always immediately apparent. Among them are these:

First, did the defendant say something which is susceptible of proof? That is, did he make a verifiable assertion of a fact? Or did he merely express an opinion, a prediction, a supposition, or make some other kind of statement which had no real factual content? If the critical comment, which might otherwise be protected as "fair comment," is based on an erroneous factual foundation, what effect does this have on the privilege of fair comment?

Second, exactly what did he say? If the material alleged to be defam-

[83] *Id.* at 570, 64 N.E.2d 765.

[1] Angoff, Handbook of Libel (1946).

[2] Ill. Const. art. II, § 4: Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.
The provision has also been interpreted otherwise—as meaning only that these are the limits beyond which government might not go in restricting civil or criminal defamation. This second interpretation is more nearly consistent with a bill of rights whose purpose is to enlarge rather than restrict personal liberty. Tilton v. Maley, 186 Ill. App. 307 (2d Dist. 1914).

atory is ambiguous or susceptible of more than one interpretation, which interpretation shall it be given? What, precisely, did the defendant say? This problem, and the "innocent construction rule," are discussed in another section of this symposium.

Third, how is the defendant permitted to establish the truth of the defamatory statements he made? What evidence may he use? What evidence is he barred from using? If conflicting evidence is offered by the plaintiff and the defendant, who is to decide what is true?

Fourth, how accurately, how completely must the defendant prove the truth of his statements? Is it sufficient for him to show that they are true in general, that the gist of them is correct; or must he show that they are true in every detail? Suppose he can establish the truth of part of what he said, but not all of it. What effect will that have on the plaintiff's cause of action or on the damages which he may recover?

Fifth, who has the burden of proof of truth, and to what degree must it be proven? If the defendant has accused the plaintiff of a crime, must the defendant prove him guilty beyond a reasonable doubt, or is some lesser degree of proof acceptable? Under what circumstances may the plaintiff be required to prove the statements false, rather than the defendant be required to prove them true?

The first two groups of questions are discussed elsewhere in this symposium. This section is concerned only with questions of pleading and proving truth as an affirmative defense.

Pleading the Truth

In early Illinois cases, as elsewhere, the defense of truth was strictly construed against the defendant. In his plea of justification (truth) he was required to allege that the statements complained of were true in every particular.[3] The extent to which this rule was followed can be shown by a few examples drawn from some of the older cases.

In 1897, a dentist brought an action for slander, alleging that the defendant had accused him of incompetence and of using dangerous anesthetics.[4] In his plea of justification, the defendant asserted that the plaintiff used cocaine as an anesthetic, and that this was indeed a dangerous practice. However, the defendant's exact words had been: "The Rice brothers will kill somebody if they don't quit using that anesthetic." Clearly, the plea was not as broad as the charge. The defendant did not plead, as indeed he could not, that the statement, "The Rice brothers will kill some-

3 Dowie v. Priddle, 216 Ill. 553, 75 N.E. 243 (1905), *affirming* 116 Ill. App. 184 (1st Dist. 1904); Rice v. Aleshire, 72 Ill. App. 455 (3d Dist. 1897); Commercial News Co. v. Beard, 116 Ill. App. 501 (3d Dist. 1904); Cooper v. Lawrence, 204 Ill. App. 261 (1st Dist. 1917).

4 Rice v. Aleshire, *supra* note 3.

body . . ." was true. The court cited a passage in Chitty on Pleading—one which was frequently cited in these old cases—in which it was stated:

> It is necessary that the plea should state specific facts, showing in what particular instance and in what exact manner, the plaintiff has misconducted himself.[5]

In 1905, in a case in which the local newspaper had printed a story accusing the acting mayor of Danville of protecting open gambling in the city,[6] the defendant newspaper stated in its defense that the plaintiff had known of the existence of a certain gambling house and, instead of suppressing it, had protected its operation. In holding the defendant's plea of justification insufficient, the court said:

> In this case it was necessary to state how, when, where and what the plaintiff did or said in protection of the gamblers. A good plea of justification to a declaration setting up the charge of felonious stealing sets up that the plaintiff did feloniously steal certain goods of a certain person of a certain value. It is necessary to state the specific offense of which the plaintiff has been guilty with time and place of commission.[7]

Again, in *Dowie v. Priddle*,[8] in which the general defamatory statements were that the plaintiff was "a vile person, the very opposite of pious, a poor, ungrammatical ignoramus . . . a scoundrel . . . an insane fanatic . . . a paranoic . . . a low degraded person, lewd and depraved and a teacher of lewd, adulterous and polygamous practices," the defendant pleaded and was prepared to prove certain specific instances of depraved and immoral behavior; but the court held this to be insufficient, stating that:

> The plea must justify the very words contained in the declaration, at least those that are actionable. In an action charging the plaintiff with adultery with one man, an answer that she had committed adultery with another man is bad. It is not sufficient to plead and prove the plaintiff guilty of a similar offense or even of one more flagrant.[9]

Under these circumstances it is not surprising that the defense of truth has been only rarely successful. Over a period of years, however, the artificial restraints on pleading and proving the essential truth of the defamatory statements came to be relaxed. One of the first Illinois cases to take a more

5 *Id.* at 460.

6 Commercial News Co. v. Beard, *supra* note 3.

7 *Id.* at 504.

8 216 Ill. 553, 75 N.E. 243 (1905), *affirming* 116 Ill. App. 184 (1st Dist. 1904).

9 Dowie v. Priddle, 116 Ill. App. 184, 192 (1st Dist. 1904). *Accord*, Sheahan v. Collins, 20 Ill. 326 (1858); Iles v. Inter Ocean Newspaper Co., 184 Ill. App. 63 (1st Dist. 1913). The theory of these old cases is apparently that a defendant is not permitted to prove the evil character of a plaintiff merely by adding up a series of individual evil acts. In *Iles*, for example, the court said: "In an action for libel, evidence of general bad reputation of the plaintiff is admissible in mitigation of damages, but it is a general rule that the character of a party cannot be impeached by proof of special damages."

realistic attitude toward the defense of truth was *Slaughter v. Johnson*.[10] In that case, the defamatory words were spoken by the plaintiff's sister-in-law and included the following:

> She is my brother's kept woman; she is a dirty, low vulgar woman; she is a dirty little whore; she is my brother's mistress. . . .

In the defendant's plea of justification, she alleged that from 1902 until September 1907 the plaintiff had been kept by the defendant's brother, who operated a gambling house in Chicago until he died in 1907. At the trial she offered to prove that her brother and the plaintiff had lived together from 1902 through 1905, and that they had had the occasion, the opportunity, and the desire after that time until his serious illness and subsequent death.

On appeal, the court stated the proof of these facts constituted a complete justification, stating that:

> [P]roof of illicit relations of the plaintiff with a certain person, up to the serious illness of that person, during which slanderous words were uttered, constituted a justification of the charge of unchastity, although the charge was in the present tense.[11]

In 1919, in *Campbell v. Masonic Chronicler Publ. Co.*,[12] the defendant newspaper had accused the plaintiff of falsely representing that he could get anyone initiated into Masonry for $15.00, that he was a "clandestine promoter" of Masonry, and "a crook, a confidence man, a lawbreaker, an imposter, and a scoundrel." The defendant, in its plea of truth, alleged facts as to the promotional activities of the plaintiff, but did not specifically allege the truth of its other characterizations concerning the plaintiff's character. The court, finding that the plea of justification was not sufficient, pointed out:

> It has even been stated that the plea of justification ought to state the charge against the plaintiff with the same precision as an indictment.[13]

To support that statement, it cited *Cooper v. Lawrence*[14] and *Dowie v. Priddle*,[15] as well as the following statement from Chitty on Pleading:

> . . . First, it is necessary, although the libel contain a general imputation upon the plaintiff's character, that the plea should state specific facts, showing in what particular instances and in what exact manner he has misconducted himself; secondly, the matters set up by way of justification should be strictly conformable with the slander laid in the declaration and must be proved as laid at

[10] 181 Ill. App. 693 (1st Dist. 1913).
[11] *Id.* at 699.
[12] 214 Ill. App. 601 (1st Dist. 1919).
[13] *Id.* at 606.
[14] 204 Ill. App. 261 (1st Dist. 1917).
[15] 216 Ill. 553, 75 N.E. 243 (1905), *affirming* 116 Ill. App. 184 (1st Dist. 1904).

> least in substance; and thirdly, if the matter of justification can be extended to the whole of the libel or slander, the plea should not be confined to part only. . . .[16]

The court then pointed out that "these rules seem to have been followed with some degree of strictness by the courts of Illinois."[17] Apparently *Slaughter v. Johnson* was an exception to the strict rules applying at the time, but it was an exception which presaged a more liberal approach.

The question of the degree of exactness which a defense of truth must possess came up again in *McWilliams v. Sentinel Publishing Co.*[18] This was an action which arose out of statements made by the defendant, the publisher of a Jewish newspaper, to the effect that the plaintiffs, who were defendants in a trial in which they had been indicted for conspiracy with Nazi officials, were traitors and pro-Fascists. In the lower court, some plaintiffs won; others did not. On appeal, the court held that the defendant newspaper had submitted sufficient evidence to make a prima facie case in support of its plea that the statements were true. The court noted that it was not necessary that the statements be proven to be true with the same degree of certainty as in a criminal trial and that there was evidence, in the conduct of the plaintiffs themselves at trial, if nowhere else, that the *Sentinel's* assessment of their character was substantially accurate.

In *Cooper v. Illinois Publishing and Printing Co.*,[19] a case involving criticism of a judge for his handling of sex cases, the appellate court instructed the trial court to permit the defendant to prove the truth of "as many separate points as he can; if nothing significant remains unproven, damages will be nominal."[20] Other aspects of this decision are discussed elsewhere in this symposium. The importance of the holding was the court's willingness to permit the defendant to prove the truth of as many separate allegations as it could and its willingness to say that if the defendant could prove all of them, the plaintiff could recover only nominal damages. This holding conflicts with the *Ogren* doctrine (discussed *infra*) that truth alone is not a sufficient defense to an action for defamation.

The easing of the requirement that the defendant plead and prove the truth of every detail of his defamatory statement made further progress in *Wilson v. United Press Ass'n.*[21] In that case, the defendant press association reported that the "Supreme Court grants Wilson a New Hearing. Wilson, *now serving a 10-year sentence* for assault with intent to kill his estranged wife, has been granted a new trial. . . ." The italicized words were incorrect; Wilson was not serving a sentence but was out on bond pending

16 Chitty on Pleading 605 (7th ed.).
17 *Supra* note 12, at 606.
18 339 Ill. App. 83, 89 N.E.2d 266 (1st Dist. 1949).
19 218 Ill. App. 95 (1st Dist. 1920).
20 *Id.* at 119.
21 343 Ill. App. 238, 98 N.E.2d 391 (1st Dist. 1951).

appeal. The same error of fact was made in the official report on the case, on which the United Press relied. The appellate court held that this error was of secondary importance. The gist of the news report was that Wilson had been improperly convicted, the report was substantially accurate and fair, and therefore not actionable.[22]

Degree of Proof

Early Illinois cases conflict with respect to the degree of proof required of a defendant who pleads the truth as a defense. A series of cases in the 1870's and 1880's include statements to the effect that a plea of justification (truth) must be sustained by a preponderance of the evidence.[23] In *Scott v. Fleming*,[24] which involved an accusation that the plaintiff had lied on the witness stand, the trial judge told the jury that before the defendant could make out his pleas of justification, he must prove them *beyond a reasonable doubt*. The Appellate Court reversed, saying that it was erroneous to require that high a degree of proof.

On the other hand, in an 1866 slander case involving an accusation of larceny, the Illinois Supreme Court concluded that to sustain the plea of justification the guilt of the party charged must be established beyond a reasonable doubt and so far as the degree of proof is concerned, the plaintiff occupies the same position as if he were upon trial on an indictment for the offense charged in the plea.[25]

The same court followed this theory in the later case of *Corbley v. Wilson*.[26] More recent cases, however, seem less concerned with describing the degree of proof required than with the question of whether or not the defendant has successfully shown that his statements were accurate.

Methods of Proof

Frequently defendants have attempted to utilize the defense of truth by pleading and offering to prove that the plaintiff was generally believed to have engaged in the improper behavior which the defendant attributed to him, or that the defendant's statements were based on "usually reliable sources" and the defendant believed them to be true. For example, in the case of *Spolek Denni Hlasatel v. Hoffman*,[27] the defendant sought to have evidence admitted to prove the truth of his statements that the plaintiff was untrue to her husband. The defamatory statements were in part these: "His wife slighted him and sought elsewhere a substitute. . . . He saw his wife begin to make love with the neighboring saloon keeper." The purpose of

22 *Id.* at 244, 98 N.E.2d at 393.

23 Tunnel v. Ferguson, 17 Ill. App. 76 (3d Dist. 1877); McDavid v. Blevins, 85 Ill. 238 (1885); Moore v. Maul, 3 Ill. App. 114 (4th Dist. 1878); Behrer v. Stock, 49 Ill. App. 270 (4th Dist. 1893).

24 17 Ill. App. 561 (2d Dist. 1885).

25 Crotty v. Morrissey, 40 Ill. 477 (1866).

26 71 Ill. 209 (1894).

27 204 Ill. 532, 68 N.E. 400 (1903).

the excluded evidence was to show that the defamatory statements were made on the strength of a statement of one apparently cognizant of the facts, and that the defendant believed the facts to be true.

In upholding the exclusion of the proffered evidence, the Illinois Supreme Court said that a defendant will not be permitted to prove truth by rumor or hearsay which violates the rules of evidence.[28] This holding, however, does not appear to eliminate the possibility of having such evidence admitted in mitigation of damages, as proof that actual malice was not present.

In *Stephens v. Commercial News Co.*,[29] the defendant newspaper had charged the plaintiff with renting rooms for immoral purposes and with pandering. The defendant attempted to assert as a defense the "record libel" privilege of reporting judicial proceedings, but the court held that since the plaintiff had only been arrested and not tried for the offenses mentioned in the defendant's news story, and since the defendant secured all its information from the police, there had been as yet no judicial proceeding and the qualified privilege of record libel did not apply. The defendant, said the court, had no right to rely on statements merely because they originated with the police, and they were not admissible to support his effort to utilize the defense of truth.

The *Stephens* case was cited and followed in the case of *O'Malley v. Illinois Publishing and Printing Co.*,[30] which also turned on the question of what kind of evidence could be used to support a defense of truth. The defendant, which published the Chicago Examiner, published an article stating that the plaintiff, "saloon and divekeeper," was "one of the most notorious gambling bosses Chicago has ever had." The article added that the plaintiff was the head of "an organization for colonizing illegal votes and was known as the North Side representative of the graft ring." The plaintiff did in fact operate a saloon at Kinzie and Clark in Chicago, and evidence developed during the trial covered many facets of Chicago underworld life.

The defendant's star witness was one of its reporters; much of his testimony was hearsay and he felt constrained to protect his sources. Witnesses for the defendant newspaper did testify that they themselves had made payoffs to O'Malley, but this evidence was not directly probative of the accusations that he was "colonizing illegal votes" and was the North Side head of the "graft ring." On appeal from a verdict for the plaintiff, the court held that the admissible evidence—not including the hearsay—did not support the charges made by the defendant and that since it was offered in an effort to make a defense of truth, it was not admissible in mitigation of damages (to show absence of actual malice). This holding

28 *Id.* at 538, 68 N.E. at 403.
29 164 Ill. App. 6 (3d Dist. 1911).
30 194 Ill. App. 544 (1st Dist. 1915).

appears to be contrary to the *Iles* case,[31] and is inconsistent with the idea that injury to a good reputation should cost the defendant more than injury to an already ruined reputation.

The Essential Truth

As has been pointed out above, the old idea that the truth should correspond exactly with the defamation if it is to be asserted as a defense has become somewhat modified. The question arises whether the more liberal rule is applied to newspapers and news reports while the strict rule is still applied to statements made by private persons in private conversations or correspondence. Is the essential truth good enough for the press, but the exact truth required of private persons? Perhaps the two approaches can be illustrated by these two cases.

A case illustrating an application of the requirements of strict truth is *Burns v. Hicks*.[32] In that case the defendant had written and mailed a letter to certain persons, in which he stated that the plaintiff—president of an association of which the defendant and the recipients of the letters were members—had embezzled association funds which had been intended for the construction of a building for the association. The defendant's letter went on to say that the plaintiff had used these funds for other purposes, "mainly to pay his own salary," and that this constituted embezzlement under the laws of the states of Illinois and Indiana since the plaintiff could not legally use the money except for the construction of the building. The court held that the defendant had not proven a case of embezzlement, but "at most a breach of trust," and that therefore the truth defense was insufficient. The court did, however, reverse the verdict for plaintiff and remanded the case to consider evidence that the defendant had consulted an attorney as admissible in mitigation of damages.

A case illustrating the more liberal view is *Rose v. Indianapolis Newspapers*,[33] decided in the Court of Appeals for the Seventh Circuit. The Indianapolis Star ran a story about the plaintiff stating that she had "slain" her husband. The headline was: "Atterbury GI Slain by War Bride." A subhead read: "News Kept Concealed Two Days." A coroner's jury found that the plaintiff had indeed killed her husband but that the killing was accidental. The State Police and U.S. Army authorities did keep the story under wraps pending the inquest. The court found the story "essentially accurate" and did not admit that slain might be synonymous with "murdered." Citing 53 C.J.S., *Libel and Slander* § 122, the court held that "the essential truth of a news report is always a defense to an action for libel."

Finding the Truth

The cases already discussed deal primarily with whether or not evidence supporting a "truth defense" will be permitted to reach the jury and

31 Iles v. Inter-Ocean Newspaper Co., 184 Ill. App. 63 (1st Dist. 1913).
32 242 Ill. App. 198 (1st Dist. 1926).
33 213 F.2d 227 (7th Cir. 1954).

whether or not, if what is pleaded is proven, it will be sufficient to support a truth defense. There is only one case in the Illinois reports on the role of the jury in determining the truth. In *Inland Printer Co. v. Economical Half Tone Supply Co.*[34] the defendant, which published a trade journal for the printing industry, published a story in which it said that the plaintiff was manufacturing and marketing a printing process for which its advertising made untrue claims. The plaintiff manufacturer claimed that the story was false and malicious; the defendant admitted publication and in its plea "alleged it was lawful for them to publish it in the interest of the trade, that they published it with good motives and justifiable ends, and that the article was true in substance and in fact."

After a judgment for the plaintiff, the defendant appealed. On remand, the court discussed the function of the jury in a case such as this in which the evidence was conflicting. The court said that although the defendant may have shown that certain specific statements which the plaintiff used in its advertising were untrue, "it was for the jury to determine from all the evidence whether the plea was sustained, *i.e.*, whether the evidence established that the device was a 'humbug,' worthless and unfitted for use, and therefore that the appellee was dishonest in advertising and selling it." Since the evidence was conflicting, and there was support for the jury's finding for the plaintiff, the court said that the finding should be respected.

Burden of Proof and the First Amendment

Throughout this discussion of truth as a defense to an action for defamation, it has been assumed that the burden of pleading and proving the truth rested on the defendant. In other words, defamatory statements are presumed by law to be false, and it is up to the defamer to assert and prove them to be at least essentially true.[35] In one important area, discussed *infra*, in the section entitled Defamation of Public Officials, this approach has been radically changed by the United States Supreme Court on constitutional grounds. In *New York Times v. Sullivan*,[36] the Court took the position that the constitutional protection of free speech does not rest upon the truth of what is spoken, that to require one who criticizes the public conduct of public officials to guarantee the exact truth of his statements or be penalized by the exaction of an indefinite amount of damages would unconstitutionally inhibit free speech. In *New York Times*, the Court shifted the burden of proof from the speaker to the defamed public official by saying that such an official may not recover unless *he proves* both that the statement was false and that it was made with actual malice. The implications of this shift in the burden of proof are discussed further below.

Mrs. B. Sidler

[34] 99 Ill. App. 8 (1st Dist. 1901).
[35] Cooper v. Illinois Publ. and Printing Co., 218 Ill. App. 95 (1st Dist. 1920).
[36] 376 U.S. 254, 84 Sup. Ct. 710 (1965).