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The Requirement of Good Motives and Justifiable Ends

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THE REQUIREMENT OF "GOOD MOTIVES AND JUSTIFIABLE ENDS"

Illinois is one of 19 states whose constitutional or statutory law requires more than "truth" as a defense to civil defamation.[1] The Illinois provision, which appears in section 4 of the bill of rights of the 1870 constitution, reads as follows:

> 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.[2] [Emphasis suplied.]

The purpose of this section is to consider what effect, if any, this provision has had on the development of the law of defamation in Illinois.

It is generally agreed that truth has for centuries been a complete defense to an action for civil defamation. This was true in England in the years before the American Revolution; it was true in the colonies and in the states until the first of them—Maine—enacted legislation in 1833 which appeared to be to the contrary.[3] Following that step, other states, including Illinois, enacted constitutional provisions, or legislative provisions, or both, which appeared to add the elements of good motives or justifiable ends to the common law truth defense.

The situation with respect to criminal defamation is entirely different. It was concerning criminal defamation that the statement, "the greater the truth, the greater the libel" was made;[4] and because the logic behind the crime of criminal libel was the tendency of libelous statements to cause breaches of the peace, truth was considered irrelevant to the gravity of the crime and was not even admissible in evidence in defense of a charge of criminal libel.[5]

Truth became admissible in criminal libel prosecutions beginning with the enactment of a statute by the state of New York in 1805 which provided:

> . . . [I]n every prosecution for libel, it shall be lawful for any defendant to give in evidence . . . the truth . . . provided always, that such evidence shall not be a justification, unless on the trial it shall

1 1 Harper & James, Torts 415-6 (1956); Prosser, Torts 631 (2d ed. 1955).

2 Ill. Const., art II, § 4 (1870).

3 For a review of the history, see Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law,* 16 Stan. L. Rev. 789 (1964). The Maine statute read: "Be it enacted . . . that in every prosecution for writing and publishing any libel, it shall be lawful for any defendant . . . to give in evidence the truth of the matter charged as libelous, and the truth of such matter being established the same shall be held a complete justification; unless it shall be made to appear that the matter charged as libelous originated from corrupt or malicious motives." (Me. Laws 1832033, ch. 73).

4 De Libellis Famosis, 5 Co. Rep. 125, 77 Eng. Rep. 250 (1606); 3 Blackstone, Commentaries 125-6 (11th ed. 1791).

5 See, *e.g.,* State v. Lehre, 2 Brevard 466 (S.C. 1811).

> be further made satisfactorily to appear, that the matter charged as libellous was published with good motives and for justifiable ends.[6]

This legislation, and other similar legislation which followed in other states, was intended to provide and did provide increased protection for the defendant; it did not make his defense more difficult but rather provided him with a new defense—truth plus motives—which had not before been available to him.

It is important to remember, therefore, that the previously quoted provision of the 1870 Illinois constitution offers increased protection to the defendant accused of criminal libel; but if it is interpreted as is generally done it decreases the common law protection of the civil defendant. In view of the fact that to decrease the area of protection of citizens is not a typical objective of a "bill of rights," and in view of the fact that the General Assembly passed implementing legislation applicable to criminal cases but has never passed such legislation with respect to civil cases, a persuasive argument can be made that the constitutional provision should be interpreted as an "outer limit" provision—prescribing that three elements (truth + motives + ends) must always be a sufficient defense to criminal libel, but that something less *may* be a sufficient defense to either civil or criminal libel, unless the legislature chooses to raise the requirements to the three elements listed above. Under this "outer limit" interpretation, the legislature could constitutionally require all three elements for an effective truth defense, but no more. In the absence of legislation, the common law, under which truth alone was a sufficient defense to civil defamation, would continue to be in effect.[7]

Indeed, in Illinois, truth alone remained a sufficient defense to actions for civil libel under the 1818 constitution. The first cases that arose under the 1870 provision, *LaMonte v. Kent*[8] and *Tilton v. Maley*,[9] were decided on the theory that the provision of the 1870 constitution had not changed the common law with respect to civil libel.

The *LaMonte* case involved a candidate for the Illinois State Senate. The defendant published a circular saying that the plaintiff candidate was "a man who has been caught in embezzlement, in passing bogus drafts. . . ." The defendant pleaded both the truth of the statement, based on specific instances which he described, and that the statement was made without malice (but not specifically that it was made with good motives and for justifiable ends). A judgment for the defendant was upheld, the court stating:

> Truth, under the Constitution, if proven, is a complete defense provided the publication was made with good motives and for

6 N.Y. Sess. Laws ch. 90, § 2 (1805).
7 For an elaboration of this line of argument, see *op. cit. supra* note 3.
8 163 Ill. App. 1 (1st Dist. 1911).
9 186 Ill. App. 307 (2d Dist. 1914).

> justifiable ends. If he [plaintiff] was unfit for office, then their motive was good and the end sought was justifiable.[10]

In the *LaMonte* case the argument of the court eliminates the need for the defendant to establish good motives and justifiable ends: to want the truth known is in itself a proper motive; to publish the truth is in itself a justifiable end.

In 1914, in *Tilton v. Maley*,[11] an Illinois appellate court did not take refuge in circular reasoning but met the question head-on. In that case, the plaintiff urged that truth should not be considered a perfect defense because the defamatory publication concerned "vices of youth long abandoned and forgotten." Judgment in the lower court was for the defendant, after a plea of truth to which the plaintiff demurred. The appellate court affirmed the judgment, stating that the sole question before it was whether or not in a civil action for libel the truth alone is a sufficient defense or whether it must further appear that the publication was made with good motives and for justifiable ends.

After pointing out that truth alone had been sufficient at common law, the court stated that the Illinois constitutional provision was intended solely to enlarge the protection of citizens from governmental prosecution for criminal libel. The court then said:

> When we remember that this line of constitutional law began in an attempt to give greater liberty of speech, and that its whole history . . . is to guarantee . . . freedom of speech and publication, it seems to us judicial legislation to give effect to the provision as abridging freedom of expression by repealing the existing common law, under which truth alone was a sufficient defense. The framers of our constitution intended that no one should ever become liable under any existing law or any future law, in either a civil or a criminal action, for publication of the truth with good motives and for justifiable ends; they used the words "or civil" giving the provision an effect beyond that of the Constitution of 1848. But it does not follow that they were aiming at the protection of reputation.
>
> If the provision had been so intended it would have been differently worded and entitled. There is nothing in this provision to prevent the legislature from enacting a law under which the truth alone will not be a defense in a civil action, as it has in effect provided in criminal actions; and nothing so far as we can see to prevent it from entirely abolishing all laws against libel. In short it is left, as far as this provision goes, to the legislature to act as it sees fit, provided only it must not interfere with publishing the truth with good motives and for justifiable ends.[12]

Essentially this court held that the common law rule on civil libel was still in effect in Illinois because the legislature had not changed it; that

10 LaMonte v. Kent, *supra* note 8, at 5.
11 *Supra* note 9.
12 *Id.* at 313-14.

the legislature could change it; but that if the legislature did change it, it could not impose more stringent restrictions on speech than those specified in the constitution.

In the same year, in the case of *Szimkus v. Ragauckas*,[13] the defense of truth and the correct interpretation of the motives-and-ends provision were considered but this case turned on the question of qualified privilege. However, the dicta on the admissibility of evidence to prove the defemation true suggested that the court thought that a libel *per se*, published beyond the scope of the privilege, could not have been published for acceptable reasons, regardless of whether or not the statement was true.[14]

The definitive interpretation of the constitutional provision was made in 1919 in the case of *Ogren v. Rockford Star Printing Co.*[15] It was directly contrary to the theory so well expressed in *Tilton*. In the first place, the court held that the constitutional provision was self-executing and that no legislation was required to find that it had changed the common law. In the second place it held that the defendant was barred from offering a truth defense unless he could first show proper motives and ends.

During a political campaign the Rockford Star criticized the plaintiff, who was the candidate of the Socialist Party. In three consecutive articles the Star made statements such as these about candidate Ogren: "Gab, dynamite, and blowing up tenement houses to hell do not produce work. . . . Socialism means terror, unrest, and financial ruin. . . ." It accused Ogren of believing in, advocating, and pursuing such methods of direct action. All three articles where held to be libelous per se.

At trial, the defendant newspaper's strategy was to ask the plaintiff, on cross examination, whether or not he had spoken or written certain words which the defendant quoted and which the defendant had used as the bases for its charges that the plaintiff believed in violent revolution. The plaintiff answered, over the objections of his counsel, that he had written or spoken the words in question. The problem was whether or not this testimony should be admitted into evidence as probative of the defendant's charges, in view of the fact that the defendant had not justified his motives and his ends.

The Illinois Supreme Court held that it should not be admitted, holding, apparently, that the proper motives and ends must be shown before the truth can be utilized. In so holding, the court ignored both *LaMonte* and *Tilton* and relied on a 1908 Nebraska case[16] and a 1914 Florida case.[17]

13 189 Ill. App. 407 (1st Dist. 1914).
14 *Id.* at 410.
15 288 Ill. 405, 123 N.E. 587 (1919).
16 Wertz v. Sprecher, 82 Neb. 834, 118 N.W. 1071 (1908).
17 Taylor v. Tribune Publishing Co., 67 Fla. 361, 65 So. 3 (1914).

Since that time, in the entire United States only one case, decided in Wyoming in 1947, has been concerned with motives and ends as distinct from truth and from malice.[18] The fact that the question arises so infrequently suggests that the requirement of proper motives and ends is becoming a purely formal one and that in those states where it exists the courts will go a long way to protect statements which they believe to be true.

The requirement that motives and ends, as well as truth, are required to make out a defense to civil libel, has had some effect on the formalities of pleading the truth, but apparently none on the results. An analysis of Illinois cases since *Ogren* uncovers none which permitted recovery against a defendant who told the exact truth and could prove it; and none to a newspaper defendant that could prove that it told the essential truth and acted without malice. So far as can be determined, there has never been a case—*except Ogren*—which went beyond requiring the absence of malice to demand a showing of some kind of positive good motives.

What motives would be "good," what ends would be "justifiable," are unanswered questions. The answers may ultimately be those suggested in the *LaMonte* case—to want the truth to be known is in itself a good motive; to speak so that the truth may be known is in itself a justifiable end. This approach was used many years ago by the New Hampshire Supreme Court[19] in a decision quoted with approval last year by the United States Supreme Court in *Garrison v. Louisiana*:[20]

> It has been said it is lawful to publish truth from good motives, and for justifiable ends. But this rule is too narrow. If there is a lawful occasion—a legal right to make a publication—and the matter true, the end is justifiable and that, in such case, must be sufficient.[21]

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DEFAMATION OF PUBLIC OFFICIALS

In Illinois and in other states as well, citizens and newspapers who have criticized public officials and candidates for public office have had to pay both damages for civil defamation and fines for criminal libel. If they were unable to prove the truth of their charges, and in Illinois if they were unable to prove good motives and justifiable ends as well, their speech was not protected. The free exchange of views and information on matters of public concern which the First Amendment was enacted to protect could be and often was severely inhibited by the sanctions of a civil suit or a criminal prosecution.

18 Spriggs v. Cheyenne Newspapers, 63 Wyo. 416, 182 P.2d 801 (1947).
19 State v. Burnham, 9 N.H. 34, 31 Am. Dec. 217 (1837).
20 379 U.S. 64, 85 Sup. Ct. 209 (1964).
21 *Id.* at 73, 85 Sup. Ct. at 215.