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Constitutional Law - Group Libel Law Upheld

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CASE NOTES

CONSTITUTIONAL LAW–GROUP LIBEL LAW UPHELD

As founder and president of the White Circle League, defendant circulated a virulent leaflet in the form of a petition to the mayor and city council of the City of Chicago advocating racial segregation and seeking new members to the League. Defendant was convicted in the Municipal Court of Chicago for violating an Illinois statute[1] which forbids any person from publishing any lithograph which portrays a lack of virtue of a class of citizens of any race, color, creed or religion. The Supreme Court of Illinois upheld the conviction on the ground that the language was designed to breed hatred against a race, and that the statute under which the conviction was obtained did not violate the right of freedom of speech as guaranteed by the State and Federal Constitutions. The Supreme Court of the United States affirmed the Illinois court. *Beauharnais v. People*, 72 S. Ct. 725 (1952).

In libeling an individual or a group, one may be subject to a civil suit or criminal prosecution, or both. The gravamen of a civil suit for libel is damages,[2] while the gravamen of a criminal prosecution is the tendency to foment a breach of the peace.[3] One who libels a large group is not subject to civil liability unless special application of the defamatory matter to an individual member of the group can be shown.[4]

Defamation of a small group will give rise to a right of action by each member of the group if the language applies to each member as an

[1] "It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. . . ." Ill. Rev. Stat. (1951) c. 38, § 471.

[2] Hughes v. New England Newspaper Pub. Co., 312 Mass. 178, 43 N.E. 2d 657 (1942); Renfro Drug Co. v. Lawson, 138 Tex. 434, 160 S.W. 2d 246 (1942); Fahy v. Melrose Free Press, 298 Mass. 267, 10 N.E. 2d 187 (1937).

[3] Annenberg v. Coleman, 121 Fla. 133, 163 So. 405 (1935); State v. Gardner, 112 Conn. 121, 151 Atl. 349 (1930); People v. Spielman, 318 Ill. 482, 149 N.E. 466 (1925). However, it has been held by some states that injury to reputation is the gravamen of both civil and criminal libel actions. See Tanenhaus, Group Libel, 35 Cornell L.Q. 261, 273, and n. 67 (1950).

[4] Hospital Care Corporation v. Commercial Casualty Ins. Co., 194 S.C. 370, 9 S.E. 2d 796 (1940); Ewell v. Boutwell, 138 Va. 402, 121 S.E. 912 (1924); Lynch v. Standard Pub. Co., 51 Utah 322, 170 Pac. 770 (1918).

individual, and not solely to the group as a unit. If, however, the group is so small that the libel necessarily applies to each member, each has a cause of action.[5] It is also possible for a civil suit to be brought in the name of the defamed group itself, such as a partnership or corporation. Though business organizations can suffer no mental pain or humiliation, they can incur business losses, and, thus, they have access to the courts for pecuniary damages.[6] Unincorporated groups generally meet grave procedural difficulties in attempting such a suit.[7] Therefore, the libeler of a large group has almost no fear of a civil action.

Libel of an individual was a common law crime, and, at common law, truth or good motives was not available as a defense.[8] This defense was subsequently made available in most states, and today, libel directed at an individual is punishable in every American jurisdiction.[9]

In all criminal prosecutions for libel, the police power of the state limits, in some manner, the individual's right to free expression.

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words–those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Retort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."[10]

However, a serious constitutional question is presented when the libel is directed at a large group rather than at an individual, in that group libel laws might be used to control the discussion of public issues and the individual's right to free expression.

[5] Swearingen v. Parkersburg Sentinel Co., 125 W. Va. 731, 26 S.E. 2d 209 (1943); Reilly v. Curtiss, 83 N.J.L. 77, 84 Atl. 199 (S. Ct., 1912); Goldborough v. Orem & Johnson, 103 Md. 671, 64 Atl. 36 (1906); Wofford v. Meeks, 129 Ala. 349, 30 So. 625 (1901).

[6] Pullman Standard Car Mfg. Co. v. Local Union No. 2928 of United Steelworkers of America, 152 F. 2d 493 (C.A. 7th, 1945); Finnish Temperance Soc. Sovittaja v. Publishing Co., 238 Mass. 345, 130 N.E. 845 (1921); Interstate Optical Co. v. Illinois State Soc. of Optometrists, 244 Ill. App. 158 (1927).

[7] But see Kirkman v. Westchester Newspapers, 287 N.Y. 373, 39 N.E. 2d 919 (1942).

[8] Prosser, Torts § 95 (1941).

[9] For a complete listing of statutes covering criminal libel, consult Beauharnais v. People, 72 S. Ct. 725, 730 n. 5 (1952).

[10] Cantwell v. Connecticut, 310 U.S. 296, 309 (1940). These words were also used by the court in Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

There have been successful prosecutions for the libel of groups such as the Knights of Columbus[11] and the American Legion,[12] but no prosecutions for the libel of a large race or religion have been successfully carried to completion prior to the instant case.

The majority of the Court reasoned that the "due process" clause of the United States Constitution does not prevent a state from punishing a libel directed at "designated collectivities," and that:

> . . . if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restricton unrelated to the peace and well-being of the State.[13]

Having classified the utterances in this case in the same category as those of an obscene or profane nature, the Court reasoned that since no one would contend that a "clear and present danger" need be shown to curb the latter types of speech, none need be shown to punish libelous matter directed at a group.

The "clear and present danger" doctrine, which the majority opinion said was not applicable to the present case, was first enunciated by Justice Holmes in *Schenck v. United States*.[14] In reviewing a conviction for circulating pamphlets urging resistance to the draft of World War I, Justice Holmes said that the individual's right to free speech could be restricted by the authority of the state only in situations where the words used were of such a nature as to create a "clear and present danger" to the state. This "clear and present danger" rule was not applied in the next important decision involving freedom of speech, which was *Gitlow v. New York*.[15] In that case the defendant was convicted for the violation of a New York statute prohibiting the advocacy of the forceful overthrow of the government. The conviction was affirmed on the theory that the test was not applicable "when the legislative body has determined . . . that utterances of a certain kind involve such danger of substantive evil that they may be punished. . . ."[16] However, the *Gitlow* case has been looked upon as an exception to the *Schenck* case and the "clear and present danger" doctrine has been "used in over twenty-five decisions of the Supreme Court."[17]

[11] Alumbaugh v. State, 39 Ga. App. 766, 147 S.E. 714 (1929); People v. Gordon, 63 Cal. App. 627, 219 Pac. 486 (1923); Crane v. State, 14 Okla. Crim. Rep. 30, 166 Pac. 1110 (1917); People v. Turner, 28 Cal. App. 766, 154 Pac. 34 (1915).

[12] People v. Spielman, 318 Ill. 482, 149 N.E. 466 (1925).

[13] Beauharnais v. People, 72 S. Ct. 725, 731 (1952).

[14] 249 U.S. 47 (1919).

[15] 268 U.S. 652 (1925). [16] Ibid., at 670.

[17] Schmandt, The Clear and Present Danger Doctrine, 1 St. Louis Univ. L. J. 265, 268 (1951).

In the recent case of *Dennis v. United States*,[18] the doctrine was modified to include words which create a high probability of serious danger in the future, though they did not constitute a present threat. Although the Court in the *Beauharnais* case refused to consider the application of the doctrine, Justices Douglas and Jackson, dissenting, believed that the doctrine was essential to the determination of the case and that no conviction could be maintained unless the words actually did create a "clear and present danger." Of this doctrine, Justice Jackson said, "It is the most just and workable standard yet evolved for determining criminality of words whose injurious or inciting tendencies are not demonstrated by the event but are ascribed to them on the basis of probability."[19]

One other objection to the majority opinion in the instant case was that the statute is too broad; that the words "virtue," "derision," and "obloquy" may "permit within their scope the punishment of incidents secured by the guarantee of free speech,"[20] such as the criticism of political parties. In answer to this, the majority stated, " 'While this court sits' it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel."[21]

The fact that the leaflet in question was in the form of a petition was brought up in dissent as a factor which might have brought the publication within the privilege to petition the government for a redress of grievances or as a valid discussion of a public issue. It was felt that this issue should have been specifically passed upon by the court, if not actually submitted to the jury for consideration.

In regard to the defense of truth and good motives, which is provided for by the Illinois Constitution,[22] the defendant's proffer of evidence as to the possible truth of the matter published was rejected by the trial court. As the defendant had made no attempt to prove the other requisite of the defense, namely, good motives, the majority of the Court felt that the offer of proof did not satisfy the entire requirements of the Illinois statute, and that, therefore, the defendant's rights were not impaired by the refusal of the evidence offered.[23] However, Justice Reed was of the opinion that the defendant was justified in not going "through the

[18] 341 U.S. 494 (1951).

[19] Beauharnais v. People, 72 S. Ct. 725, 754 (1952).

[20] Ibid., at 744.

[21] Ibid., at 734.

[22] Ill. Const. Art. II, § 4.

[23] In order for the defense of truth to prevail in Illinois, the law requires that the truth of all facts of the utterance must be shown together with good motives for publication. Ill. Rev. Stat. (1951) c. 38, § 404; People v. Strauch, 247 Ill. 220, 93 N.E. 126 (1910); People v. Fuller, 238 Ill. 116, 87 N.E. 336 (1909).

useless ceremony of offering proof"[24] of good motives after his offer to prove truth was rejected. Although Justice Reed did not think that the defendant had any probability of proving the defense, he believed his evidence should have been admitted and evaluated.[25]

In upholding as constitutional, for the first time, a group libel statute, the *Beauharnais* decision seems to solve, in part, the question of whether such statutes conflict with the right of free speech. This case may, however, be limited in application by future decisions, which, by the reasoning of the majority in the instant case, must be decided in the light of the particular wording of the statute and factual situation involved.

Though the Court upheld the constitutionality of the statute, it was made clear that their finding "carries no implication of approval of the wisdom of the legislation or of its efficacy."[26] However, the decision is in line with the modern tendency to subordinate the rights of the individual where, in the Court's opinion, it seems necessary to protect the interests of a large group.

It is interesting to note that the *Beauharnais* case seems to fall into the pattern of the *Gitlow* case, in that it gives great weight to the legislative deliberations of the state rather than following the more recent trend which applies the "clear and present danger" doctrine as exemplified by the *Dennis* case. It is impossible, of course, to predict with any degree of accuracy the repercussions of this case, but it may be relied on in deciding other cases limiting individual rights in favor of group interests, and, thus, it should be closely scrutinized before being applied.

TORTS–RECOVERY FOR PRENATAL INJURIES

Plaintiff was *en ventre sa mere* during the ninth month of pregnancy when the mother fell down the stairs in defendant's multiple dwelling house. As a result of the fall, plaintiff came into this world permanently maimed and disabled. As a defense to the charge of negligence, defendant relied on a precedent in New York which had refused to allow recovery for an injury sustained before birth.[1] The New York Court of Appeals reversed a judgment in favor of defendant[2] and granted damages to plaintiff. *Woods v. Lancet,* 303 N.Y. 349, 102 N.E. 2d 691 (1951).

[24] Beauharnais v. People, 72 S. Ct. 725, 752 (1952).

[25] In 61 Yale L.J. 252, 260 (1952), is expressed the fear that "... giving the defendants the chance to argue the 'truth' of their hate canards would make the trials sounding-boards for their propaganda. Such 'prosecutions' might be warmly welcomed by professionals."

[26] Beauharnais v. People, 72 S.Ct. 725, 736 (1952).

[1] Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921); cf. In re Robert's Estate, 158 N.Y. Misc. 698, 286 N.Y. Supp. 476 (Surr. Ct., 1936).

[2] Woods v. Lancet, 278 App. Div. 913, 105 N.Y.S. 2d 417 (1951).