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The Zenger Case Today

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Few incidents in American history have had an impact on freedom of the press in this country more important or more sustained than that of the seditious libel trial of John Peter Zenger, publisher of the New York Weekly Journal, in August 1735.

The importance of the trial derives from its influence on press freedom in the English speaking world, its contribution to the liberty of the press to attack abuses of governmental power during and after the Revolution, and English and American law on seditious libel.

Current struggles of the press under prosecutions for libel give the Zenger trial a growing contemporary interest.

When the First Amendment was adopted in 1791, it restrained Congress from passing any law restricting "freedom of the press."

What was meant by "freedom of the press" was then widely understood to mean the right to get information, the right to print without prior restraint, the right to print the truth with impunity, and the right to distribute. These were rights familiar to 18th Century Americans. The Zenger case dealt with one of these four elements of press freedom long before the adoption of the Constitution or the First Amendment.

The history of the Zenger case cannot be fully related here, but its essential elements must be grasped if its significance is to be understood. Zenger's newspaper confronted an arbitrary New York government. It was the only avenue of the opposition to that government. William Cosby, the royal governor dominated the assembly chosen by royalist influence and continued from year to year. When displeased with the law court he dismissed the Chief Justice and replaced him without consent of the council or approval of the sovereign. The governor became so enraged that in the fall of 1734, Cosby got the council to order issues of the Weekly Journal to be burned. The court of quarter sessions would not order it done. New York's alderman refused to order it. Finally a slave of the sheriff burned the offending copies. Cosby then tried to get a grand jury to indict but failed. He then urged the Assembly to act against Zenger. That failing, he proceeded on an information charging the editor with "tending to raise Factions and Tumults among the people." Zenger was arrested and imprisoned. When his counsel at his trial in April challenged the authority of the Cosby judges, the lawyers were disbarred. At Zenger's trial in August, he was represented by Andrew Hamilton, a distinguished Philadelphia lawyer.

Hamilton astonished the court by asserting the right of the jury to determine if the matter published was seditious libel, and by claiming truth as a defense. To the jury he said: "The question before you is not the cause of a poor printer, nor of New York alone; it is the best cause - the cause of liberty.

Every man who prefers freedom to a life of slavery, will bless and honor you as men, who by an impartial verdict, lay a noble foundation for securing to ourselves, our posterity, and our neighbors, that to which nature and the honor of our country have given us the right - the liberty of opposing arbitrary power by speaking and writing truth." The jury pronounced Zenger "not guilty". The historian George Bancroft reported that a Revolutionary War patriot later hailed the verdict as "the morning star of the American Revolution."

Hamilton's arguments that the jury had the power to decide on the guilt or innocence of the accused and the right to rule truth a defence in a libel case were, in the opinion of lawyers in the colonies and in England "bad law". Blackstone was the most quoted authority on the law and he said: "Every libel has a tendency to break the peace, or provoke others to break it, which offense is the same whether the matter contained be true or false; and therefore the defendant, on an indictment for publishing a libel, is not allowed to allege the truth of it by way of justification." Arthur Schlesinger, Sr. quotes an Englishman as saying of Hamilton's argument: "If it is not law, it is better than law, it ought to be law, and will always be law, where Justice prevails."

The larger issue, Hamilton had argued, was "the liberty -- both of exposing and opposing arbitrary Power (in these parts of the world at least) by speaking and writing Truth." When the colonial press mounted its attack on British authority 30 years later, it was to the Zenger verdict that one editor after

another appealed to justify bitter attacks on the establishment.

Finally, in 1791, English law caught up with Hamilton, Fox's Libel Act stated: "That, on every such trial, the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information; and shall not be required or directed by the court or judge before whom such indictment or information shall be tried, to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel...."

The United States Sedition Act in effect from 1798 to 1801, a measure otherwise odious to press freedom, also embraced Hamilton's view of truth as a defence in libel actions stating: "...if any person shall be prosecuted under this act for the writing or publishing any libel aforesaid, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence in his defence, the truth of the matter contained in the publication charged as libel. And the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases."

Alexander Hamilton, in People v. Croswell, in 1804 put the whole matter in a nutshell. "Freedom of the press", he said, "consists of the right to publish with impunity, truth, with good motives, for justifiable ends, though reflecting on government, magistracy, or individuals."

The two words in Alexander Hamilton's succinct statement that are of great contemporary interest and concern are "with

impunity". Such is the present state of libel law in the United States that no editor may say that he may publish the truth "with impunity". The press generally hailed Sullivan v. New York Times as a landmark decision. It placed alleged libel of public persons on a different ground, rejecting as libelous of public persons matter published in good faith and without "malice". Two problems have followed. The definition of a public person has become a fluctuating matter. Moreover, the courts construe "malice" not in the vernacular manner but interpret it to mean failure to take reasonable measures to ascertain the truth or indifference to the knowledge that a matter is untrue. The effort to establish "malice" or the absence of it has opened the door to inquiry into the state of the mind of editor or reporter. Hitherto, in this country, citizens were believed secure against inquisition into what a man thinks. One may not write or speak truth "with impunity" if government may inquire into not only what was written but also into what was in the mind of the writer before he wrote and while he was writing.

There has been a veritable tide of libel suits in recent years. The amounts sought in these cases reached a new high. The nice distinctions as to "malice" have served more to confuse than to clarify. Israeli Defense Minister Ariel Sharon sued TIME and in that proceeding the jury held TIME had falsely reported that Sharon had discussed measures to get revenge for the murder of Lebanese President Elect Bashir Gemayel, but it ruled that TIME did not know the story was false or have any

doubts about its accuracy, and therefore had not been proven guilty. General William Westmoreland sued CBS over a series alleging he had mislead the country and President Lyndon Johnson on enemy strength, and after a protracted trial and before a verdict was reached Westmoreland withdrew his suit in exchange for a CBS statement that it had not intended to impugn his patriotism. Rev. Jerry Falwell sued Hustler for publishing a satirical advertisement suggesting Falwell was a drunk, but a jury disagreed, although it awarded Falwell \$200,000 for emotional distress. A panel of the U.S. Court of Appeals in Washington re-instated Mobil Oil Company President William P. Tavoulaire's 1982 libel judgment against The Washington Post, basing the reversal on a contention that the Post's muckraker role showed there was publication with malice. The Post is appealing to the full appeals court. The U.S. Court of Appeals in St. Louis ruled there would have to be a trial to determine if NEWSWEEK had libeled Governor William Janklow of South Dakota by reporting he had once been accused of raping an Indian girl. A federal district judge had held there was insufficient evidence of actual malice and granted the magazine summary judgment. The Texas Supreme Court has held a plaintiff cannot collect punitive damages if he suffered no actual injury as the result of publication of libelous information. It overturned a \$2.5 million punitive damage award.

These, and many other libel cases, suggest the perils of publication. Verdicts for plaintiffs in many of these cases would have involved confiscatory amounts of money.

It is not, however, confiscatory verdicts alone that divest editors of the right to print "with impunity"; it is, as well, the cost of counsel. There is no practical limit on the power of an individual to bring a libel suit. Once such a suit is commenced, counsel must be retained. The cost of the simplest libel case can be ruinous for small publications. Some litigants have moved to offset such frivolous suits by counter-suits against complainants. This may help, but it is certain to increase the costs of counsel.

Circuit courts continue to wrestle with the application of the "public figure" rule and the "malice" rule in Sullivan v New York Times. The First Circuit struggled with the question of whether a company making sound equipment merited "public figure" treatment in a case against the Consumer's Union. (Bose v Consumer's Union)

The Second Circuit recommended a specific limitation to the constitutional protection extended to articles about public figures. It reached the curious conclusion that because stories about Charles J. Bufalino, a mafia type, was not identified in the news report as a public figure, the Associated Press was presumptively precluded from relying upon the malice standard in Sullivan v New York Times.

The Fourth Circuit held interestingly that the mere passage of time does not convert a public figure from that status. (Time v Johnson).

The Fifth Circuit has discussed the quality and quantity of proof necessary to prove constitutional malice in at least

11 cases.

The Sixth Circuit has dealt with "public figure" problems in seven cases. In Orr v Argus Press the court interestingly held that a shopping mall promoter was a public figure when the project collapsed. In another interesting "public figure" case it was held that a high school student senate president was a "public figure". (Henderson v Van Buren)

The Seventh Circuit handled eight different "public figure cases". It also dealt with an interesting "malice case" (Time v Pape) in which an erroneous report of a public document was held not due to malice.

The Eighth Circuit dealt with 41 decisions touching on defamation and privacy.

The Ninth Circuit has dealt with five cases involving public figures.

The Tenth Circuit dealt with one multi-million dollar libel judgment against Penthouse Magazine with former Chief Judge Seth writing: "The story is a gross, unpleasant, crude, distorted attempt to ridicule the Miss America Contest and contestants. It has no redeeming features whatever. There is no accounting for the vast divergence in views and ideas. However, the First Amendment was intended to cover all of them."

The Eleventh Circuit dealt extensively with the public figure and malice issues in the E. Howard Hunt v Liberty Lobby, in which it ordered a new trial.

In the District of Columbia the Court made an unusual "public figure" finding in Ryder v Time. It held that Richard J. Ryder,



a past member of the Virginia House of Delegates and an unsuccessful candidate for the Virginia State Senate was not a public figure for the purposes of his defamation action based on a TIME story containing the following passage: "Virginia....attorney Richard Ryder took stolen money and a sawed-off shotgun from his client and stored them in his own safety deposit box and....was temporarily suspended from practice." The court held Ryder's public activities "had nothing to do with the reference to Richard Ryder in the essay and, in any case, these activities were no longer engaged in by the plaintiff."

These illustrative citations are taken from the Libel Defense Resource Center 50 State Survey for 1984. They demonstrate how difficult it is for laymen to reach a clear understanding of "public figure" status and of "malice" in the Sullivan v New York Times case.

The great metropolitan papers can finance litigation arising from these complicated and sometimes conflicting opinions but small publications can be intimidated by the mere cost of legal advice, to say nothing of the risk of libel verdicts.

This has become a threat to "impunity" that is bound to diminish publication of news and comment on public affairs. The cost of error as to fact or "malice" in the language of Sullivan v New York Times can be prohibitive for small publications. And even the cost of a successful defence can put an unbearable burden on a little newspaper. The inevitable result of such a hazard - new in our society - is going to be more

cautious coverage of public affairs. Andrew Hamilton defended John Peter Zenger without charge, but there are no such legal free rides about nowadays.

The current costs of Zenger's case would have been the end of the New York Weekly Journal. Poor Zenger spent ten months in jail because he could not even produce bail. Now as in 1735 "the liberty of opposing arbitrary power by speaking and writing the truth" is the issue.

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