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THE REFORM OF THE INNOCENT CONSTRUCTION RULE IN ILLINOIS

Chapski v. Copley Press
92 Ill. 2d 344, 442 N.E.2d 195 (1982)

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From 1962 until 1982, Illinois defamation law had been very favorable for defendants. The state had become a virtual haven for journalists.[1] This situation was the result of the Illinois Supreme Court's adoption of the "innocent construction" rule in *John v. Tribune Co.*[2] The rule, which was unique to Illinois,[3] stated that if an allegedly defamatory statement could possibly be given a nondefamatory meaning as a determination of the judge, it would be nonactionable *per se*.[4] Some commentators regarded the adoption of this rule as an attempt by the Illinois Supreme Court to counter the pro-plaintiff bias that had developed prior to *John*.[5]

Although some commentators have thought that the innocent construction rule protected the press,[6] the rule has been subjected to substantial criticism. The rule encouraged journalists to write a potentially defamatory statement ambiguously so that it could be given an innocent interpretation and thus be ruled nondefamatory.[7] While the rule required judges to give the words their "natural and obvious" meaning,[8] judges would instead concentrate on finding a possible innocent interpretation of the words, and often strained to do so, thereby keeping the case from the jury.[9]

The potential abuse of the rule and the constitutional protections

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1. Chi. Law., Dec. 1982, at 5, col. 1.
2. 24 Ill. 2d 437, 181 N.E.2d 105, *cert. denied*, 371 U.S. 877 (1962).
3. *See* Note, *The Illinois Doctrine of Innocent Construction: A Minority of One*, 30 U. CHI. L. REV. 524 (1963) [hereinafter cited as *The Illinois Doctrine*]. The majority rule in defamation is that it is a question of law whether certain words are capable of a defamatory meaning and it is a question of fact whether they were understood in a defamatory sense.
4. John v. Tribune Co., 24 Ill. 2d 437, 442, 181 N.E.2d 105, 108, *cert. denied*, 371 U.S. 877 (1962).
5. *See The Illinois Doctrine, supra* note 3, at 526. *See infra* notes 89-94 and accompanying text.
6. Chi. Law., Dec. 1982, at 5, col. 2.
7. *Id.* at 5, col. 1.
8. 24 Ill. 2d at 442, 181 N.E.2d at 108.
9. *See infra*, notes 102-06 and accompanying text.

now given to defendants in defamation actions by the United States Supreme Court[10] led the Illinois Supreme Court to "modify"[11] the innocent construction rule in 1982 in *Chapski v. Copley Press*.[12] The rule as modified in *Chapski* requires judges to give allegedly defamatory words an innocent construction only if it is reasonable to do so.[13] The rule still requires judges to make the initial determination and declare the words nonactionable but only if an innocent interpretation can *reasonably* be found.[14]

This case comment will trace the development and application of the innocent construction rule in Illinois beginning with its common law origins. The circumstance under which the rule was adopted in Illinois will be set out. The use of the rule in Illinois since 1962 as well as the changing circumstances in defamation law will be highlighted. *Chapski v. Copley Press* will then be presented and analyzed. This comment will conclude that although the innocent construction rule had some validity when it was adopted in 1962, those circumstances no longer exist. This comment will also conclude that although the Illinois Supreme Court's reconsideration of the rule was necessary, the court did not go far enough. The Illinois Supreme Court should have seized the opportunity to overrule *John* and replace it with a reasonable construction rule—the rule of the majority of jurisdictions.[15]

HISTORICAL BACKGROUND

Defamation Law in Illinois Prior to John

The doctrine of innocent construction in defamation law is an outgrowth of the *mitior sensus* doctrine which developed in the sixteenth and seventeenth centuries.[16] The *mitior sensus* doctrine required that a statement be held nondefamatory, and thus nonactionable, if such a meaning could be "twisted" out of it.[17] During the sixteenth and seventeenth centuries, a great number of defamation actions were brought before the court.[18] It has been suggested that the arbitrary rule of *mitior*

10. *See infra*, notes 122-30 and accompanying text.
11. Chapski v. Copley Press, 92 Ill. 2d 344, 351, 442 N.E.2d 195, 198 (1982).
12. 92 Ill. 2d 344, 442 N.E.2d 195 (1982).
13. *Id.* at 352, 442 N.E.2d at 199.
14. *Id.*
15. *See infra* note 48.
16. Note, *Defamation in the Sixteenth and Seventeenth Centuries*, 40 L.Q. REV. 302, 404-08 (1924) [hereinafter cited as *Defamation*]. For further analysis of the common law development in American defamation law, see Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903).
17. *Defamation, supra* note 16, at 407.
18. *See* Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051,

sensus was adopted as an effective way to unclog the courts.[19] During this time, when the *mitior sensus* doctrine flourished, courts went to great lengths to find a nondefamatory meaning in an allegedly defamatory statement.[20] The application of the doctrine resulted in "some remarkable judicial acrobatics" in order to lessen the number of defamation actions.[21]

In 1842, the Illinois Supreme Court rejected the *mitior sensus* doctrine in *McKee v. Ingalls*.[22] The court said that a better rule would be "to hold the party responsible for the words in the sense in which he spoke them."[23] The court further stated that if the meaning of a statement is doubtful, the rest of the conversation can be used to explain it.[24]

While it was clear that the Illinois Supreme Court had rejected the common law doctrine of *mitior sensus*, there was still some uncertainty as to what standard the court was adopting.[25] It was unclear whether the court was adopting a completely objective standard with the relevance on the interpretation of the words by a third party, a completely subjective standard with the relevance being whether the defendant intended to defame the plaintiff, or a combination of the two standards.

In *Nelson v. Borchenius*,[26] in 1869, the Illinois Supreme Court also rejected what later became known as the "innocent construction"

1064-65 (1962); *Symposium: Libel and Slander in Illinois*, 43 CHI.-KENT L. REV. 1, 2-3 (1966) [hereinafter cited as *Libel and Slander*].

19. *Libel and Slander, supra* note 18, at 3.

20. *See The Illinois Doctrine, supra* note 3, at 526.

21. Lovell, *supra* note 18, at 1064-65. An extreme example of the *mitior sensus* doctrine is Holt v. Astrigg, 79 Eng. Rep. 161 (1608). In that case, the allegedly libelous words were "Sir Thomas Holt struck his cook on the head with a cleaver, and cleaved his head, the one part lying on the one shoulder, and another part on the other." While a reasonable person would interpret these words as imputing murder, the court applied the *mitior sensus* doctrine and ruled otherwise. The court reversed a judgment for the plaintiff and held that only an actionable trespass is imputed to the subject of the statement. Slander, the court said, must be direct. The court added, "[N]otwithstanding such wounding, the party may yet be living, and it is then but trespass." In other words, the defendant might have merely meant that Sir Thomas Holt had subjected his cook to a temporary inconvenience and had taken an unwarrantable liberty with part of the cook's property by splitting the cook's head in two, "for which act the cook, on recovering from his shoulders and reuniting the undivided moities of his cleft skull, might sue his master in trespass." H. BOWER, THE LAW OF ACTIONABLE DEFAMATION 334 (1908).

22. 5 Ill. 30 (1842). The actionable words were " 'You are a damned thief'; 'If you have got money, you stole it'; 'I believe you are a damned thief'; 'I believe you will steal.' " *Id.* at 32.

23. *Id.*

24. *Id.* at 33. *See also* Winchell v. Strong, 17 Ill. 597 (1886). The Illinois Supreme Court held that to understand "the real intention of the defendant when he used the words charged," the conversation held by defendant shortly after he accused the plaintiff of "stealing lumber" should have been admitted into evidence. 17 Ill. at 602.

25. *See* Polelle, *The Guilt of the "Innocent Construction Rule" in Illinois Defamation Law*, 1 N. ILL. U.L. REV. 181, 189 (1981).

26. 52 Ill. 236 (1869).

rule;[27] instead, the court adopted a reasonableness standard.[28] The *Nelson* court affirmed a verdict for the plaintiff where the defendant had made false statements about the plaintiff personally and in his trade as a merchant. The defendant had called the plaintiff a "villain, a rascal, and a cheater, in his said business as a merchant."[29] The *Nelson* court rejected the defendant's contention that a witness can only testify as to what words were spoken and not what the witness understood the words to mean.[30] The court stated that the injury in an action for slander occurs from the effect that the actionable words have on the listeners.[31] If a statement is ambiguous and listeners understand it in an actionable sense, then the statement is actionable.[32] The court said that it is the duty of the speaker to avoid the use of language which would be liable to a defamatory construction "in the minds of reasonable men who might hear him."[33] Such a construction would not be conclusive upon a jury, according to the court, but it would be "admissible in evidence, as tending to show what meaning hearers of common understanding would and did ascribe to them."[34]

The Illinois Supreme Court further emphasized its move away from the common law's *mitior sensus* approach in 1875 in *Miller v. Johnson*.[35] The defendant in *Miller* had falsely accused the plaintiff of stealing "corn and oats from him."[36] The court affirmed a verdict for the plaintiff and refused to excuse the defendant's guilt by an explanation that he did not intend by his words to impute the crime of larceny to the plaintiff.[37] The *Miller* court stated that a defendant could not use

27. *Id.* at 238-40. The innocent construction rule is essentially the same as the common law doctrine of *mitior sensus*, with the latter being a little more extreme. *See, e.g.*, Holt v. Astrigg, 79 Eng. Rep. 161 (1608).

28. Polelle at 238.

29. *Id.* at 237.

30. *Id.* at 238.

31. *Id.*

32. *Id. See also* Ogren v. Rockford Star Printing Co., 288 Ill. 405, 122 N.E. 587 (1919).

33. 52 Ill. at 238. *See also* Barnes v. Hamon, 71 Ill. 609 (1874) (the court took into account innuendo and colloquium in determining that defendant's words were defamatory). If a statement standing alone is defamatory, it is defamatory "on its face." However, a statement is also actionable if the defamatory meaning becomes apparent only by adding extrinsic facts. The plaintiff pleads and proves such additional facts as inducement and establishes the defamatory meaning by innuendo. *See* BLACK'S LAW DICTIONARY 709 (5th ed. 1979).

Colloquium refers to the requirement that the defamatory statement is "of or concerning the plaintiff." If it is not clear that the statement on its face refers to the plaintiff, the plaintiff may introduce extrinsic facts that would lead a reasonable reader, listener, or viewer to perceive the defamatory statement as referring to the plaintiff. *Id.* at 240.

34. 52 Ill. at 238. The court further reasoned from this that if an alleged slander is in a language unknown to a bystander, it cannot be actionable. *Id.* at 239.

35. 79 Ill. 58 (1875).

36. *Id.* at 59.

37. *Id.* at 60.

as a defense to a slander action that he did not intend to imply what reasonable hearers presumptively understood to be the meaning of his statement.[38]

Another shift from the innocent construction rule was in 1879 in *Schmisseur v. Kreilich*.[39] In *Schmisseur*, the actionable words were spoken in French.[40] The court, in affirming a verdict for plaintiff, rejected defendant's argument that an allegation of whoring did not impute the crime of fornication.[41] The court stated that it would not put a "strained construction" on words so as to relieve the speaker of liability.[42] The court held that "words are to be construed according to their common acceptation."[43]

The innocent construction rule was again rejected in the early part of the twentieth century.[44] For example, in *Ogren v. Rockford Star Printing Co.*,[45] the Illinois Supreme Court held that "where words are ambiguous or equivocal in meaning, the question of the meaning to be ascribed to them is for the jury, although the question as to whether or not any particular meaning is libelous is for the court."[46] It was clear at this point that the court had adopted an objective or "reasonable construction" standard for defamation actions.[47] After 1925, the Illinois Supreme Court did not address the innocent construction rule until 1962 with its landmark decision in *John v. Tribune Co.*[48] where it

38. *Id.*

39. 92 Ill. 347 (1879).

40. *Id.* at 351-52. The defendant said of the plaintiff: '*La fille, Kreilich, a fait la putaine avec mon garcon*.' Translated, 'The girl, Kreilich, has acted (made) the whore with my boy.' '*Elle a fait la putaine a Belleville a St. Louis, et au village*.' Translated, 'She has acted (made) the whore in Belleville, in St. Louis, and in the village.'

41. *Id.*

42. *Id.* at 352.

43. *Id.*

44. People v. Spielman, 318 Ill. 482, 149 N.E. 466 (1925); Ogren v. Rockford Star Printing Co., 288 Ill. 405, 122 N.E. 587 (1919); Ball v. Evening Am. Publishing Co., 237 Ill. 592, 86 N.E. 1097 (1909).

45. 288 Ill. 405, 122 N.E. 587 (1919).

46. 288 Ill. at 412, 123 N.E. at 591.

47. Under a reasonable construction rule, the only function of the court is to determine whether the words are reasonably capable of a defamatory interpretation. If they are, the jury determines whether in fact the average reasonable hearer or reader understood the words as defamatory or innocent. RESTATEMENT (SECOND) OF TORTS § 614 (1977). This is the rule that exists in the majority of states. *See, e.g.*, Gray v. WALA-TV, 384 So. 2d 1062 (Ala. 1980); William v. Daily Review, Inc., 236 Cal. 2d 405, 46 Cal. Rptr. 135 (Dist. Ct. App. 1965); Terry v. Hubbell, 22 Conn. Supp. 248, 167 A.2d 919 (1960); Wolfson v. Kirk, 273 So. 2d 774 (Fla. Dist. Ct. App. 1973); Jones v. Walser, 107 N.H. 379, 222 A.2d 830 (1966); James v. Gannett, 40 N.Y.2d 415, 353 N.E.2d 834, 386 N.Y.S.2d 871 (1976); Corab v. Curtis Publishing Co., 441 Pa. 432, 273 A.2d 899 (1971); Taylor v. Houston Chronicle Publishing Co., 473 S.W.2d 550 (Tex. Civ. App. 1971); Western States Title Ins. Co. v. Warnock, 18 Utah 2d 70, 415 P.2d 316 (1966); D.R.W. Corp. v. Cordes, 65 Wis. 2d 303, 222 N.W.2d 671 (1974).

48. 24 Ill. 2d 437, 181 N.E.2d 105, *cert. denied*, 371 U.S. 877 (1962).

adopted that rule.[49]

Curiously, the Illinois Supreme Court based its decision in *John* on the decisions of some of the Illinois appellate courts in the nineteenth and twentieth centuries since none of its own precedent supported such a decision.[50] The first Illinois appellate court to give credence to a form of the innocent construction rule was *Young v. Richardson*[51] in 1879. In *Young*, the court relied on *Cooley on Torts* and said that "It is a principle of law that 'words alleged to be libelous will receive an innocent construction if they are fairly susceptible of it.' "[52] This was only dictum, however, because the court did not rely on the innocent construction rule when it reversed a jury verdict for a plaintiff who had been reported to the county board of supervisors as having falsely inflated his criminal conviction rate so as to increase his fees.[53]

The recognition of the rule by the *Young* court was an anomaly since later Illinois appellate courts until 1928 did not adhere to the innocent construction rule.[54] These courts instead followed the Illinois Supreme Court precedent of reasonable construction or common acceptation.[55] Another problem with *Young* was that the court, when citing *Cooley*, ignored the second half of the quoted sentence which said "and when it is uncertain whether they convey a defamatory imputation the question is one for the jury."[56] The court also ignored the Illinois Supreme Court precedent which had clearly adopted a standard much different than an "innocent construction" rule, and the court did not cite any authority to support its position on the rule.[57]

It was not until 1928 in *Fulrath v. Wolf*[58] that an Illinois appellate court again applied the "innocent construction" rule to a defamation action.[59] The defendant in *Fulrath* wrote a letter to the plaintiff which stated that due to a thorough investigation of plaintiff's business prac-

49. *Id.* at 442, 181 N.E.2d at 108.

50. *See, e.g.*, Piacenti v. Williams Press, 347 Ill. App. 440, 107 N.E.2d 45 (1942); Dilling v. Illinois Pub. & Printing Co., 340 Ill. App. 303, 91 N.E.2d 635 (1930); Fulrath v. Wolfe, 250 Ill. App. 130 (1928).

51. 4 Ill. App. 364 (1879).

52. *Id.* at 374.

53. *Id.* The *Young* court reversed the jury verdict for the plaintiff due to the variance of proof from the declarations filed by the plaintiff and the error of the trial court in excluding defendant's conditional privilege of reporting the matter to a public board. *Id.* at 375-76.

54. *See, e.g.*, Burke v. Stewart, 81 Ill. App. 506 (1898); Tottleben v. Blankenship, 58 Ill. App. 47 (1894); Bihler v. Gockley, 18 Ill. App. 496 (1886); Clifford v. Cochrane, 10 Ill. App. 265 (1882); Foval v. Hallett, 10 Ill. App. 265 (1881).

55. *See supra* cases cited in note 55.

56. T. COOLEY, THE LAW OF TORTS 208 (1879).

57. *See* Polelle, *supra* note 25, at 191-92.

58. 250 Ill. App. 130 (1928).

59. *Id.* at 135.

tices, the defendant was discontinuing his business relationship with plaintiff.[60] While the plaintiff conceded that the letter itself was not libelous *per se*,[61] plaintiff contended that by adding certain innuendos[62] from evidence of prior conversations between plaintiff and defendant, the letter became libelous.[63] The plaintiff alleged that with the innuendos, defendant referred to the plaintiff in the letter as a "gypper."[64] The court held that slanderous words could not be read into the letter so as to make the otherwise nonlibelous letter libelous. Libel, the court stated, must be based on the written words alone. The court, paraphrasing *Young*, held, "The words of an alleged libel, where susceptible of it, will receive an innocent construction by interpretation."[65]

The adoption of the innocent construction rule by the *Fulrath* court was based on weak precedent.[66] The court relied on *Young*, which itself had no real basis for recognizing the innocent construction rule.[67] The *Fulrath* court also relied on *Harkness v. Chicago Daily News*,[68] which applied a reasonable construction rule and not an "innocent construction" rule.[69] The *Harkness* court stated that in order to determine the meaning of an allegedly libelous statement:

> [E]ach phrase must be construed in light of the entire publication. The words are to be taken in their natural and obvious meaning. . . . The test is, what would men or ordinary understanding infer from the words of the libel? . . . If the words of the libel are fairly susceptible of any defamatory meaning . . . to sustain a demurrer to a declaration . . . upon the ground that they form no cause of action, would be error.[70]

Furthermore, *Fulrath* ignored Illinois Supreme Court precedent of the nineteenth and twentieth centuries which had clearly rejected the *mitior sensus* doctrine, the prototype of the innocent construction rule.[71]

The Illinois appellate court cases that followed *Fulrath* were in-

60. *Id.*

61. A publication is libelous *per se* when it is defamatory on its face. BLACK'S LAW DICTIONARY 825 (5th ed. 1979).

62. *See supra* note 34.

63. 250 Ill. App. at 135.

64. *Id.*

65. *Id.*

66. *See* Polelle, *supra* note 25, at 195. The court relied on Young v. Richardson, 4 Ill. App. 364 (1879), and Harkness v. Chicago Daily News Co., 102 Ill. App. 162 (1902).

67. *See supra* notes 52-58 and accompanying text.

68. 102 Ill. App. 162 (1902).

69. *Id.* at 165.

70. *Id.*

71. People v. Spielman, 236 Ill. App. 637, *aff'd*, 318 Ill. 482, 149 N.E. 466 (1925); Ball v. Evening Am. Publishing Co., 142 Ill. App. 656 (1908), *rev'd*, 237 Ill. 592, 86 N.E. 1097 (1909); Nelson v. Borchenius, 52 Ill. 236 (1869).

consistent in their application of the innocent construction rule. While some cases adopted the *Fulrath* analysis and ignored the Illinois Supreme Court,[72] others instead followed the more established Illinois Supreme Court precedent of reasonable construction.[73]

John v. Tribune Co.

A major turning point in Illinois defamation law came in 1962 with the Illinois Supreme Court's decision in *John v. Tribune Co.*[74] The Illinois Supreme Court in *John* adopted the innocent construction rule which states that an "article is to be read as a whole and the words given their natural and obvious meaning, and requires that words allegedly libelous which are capable of being read innocently must be so read and declared nonactionable as a matter of law."[75]

The libel action in *John* arose from two newspaper articles concerning a police raid on a building in Chicago. The police arrested the owner of the apartment building and several women in the owner's apartment for prostitution. The newspaper articles reported that the owner of the apartment building was Dorothy Clark, who was 57 years old and also known as Delores Reising, Eve Spiro, and Eve John. The articles also said that Dorothy Clark was a "former girl friend of Tony Accardo, Capone gangster," that she kept a "disorderly house," and that she sold liquor without a license.[76]

The plaintiff, a 27 year old woman, contended that the articles were "of and concerning her" because her name was Eve Spiro John. Her maiden name was Eve Spiro and her name at the time that the articles were written was Eve John. The plaintiff was the only person by that name who lived at the address in the article, but she was not involved with the raid or with any of the immoral activities of her

72. *See, e.g.*, Judge v. Rockford Memorial Hosp., 17 Ill. App. 2d 365, 150 N.E.2d 202 (1958); Epton v. Vail, 2 Ill. App. 2d 287, 119 N.E.2d 410 (1954); Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N.E.2d 742 (1952).

73. *See, e.g.*, Proesel v. Myers Pub. Co., 24 Ill. App. 2d 501, 165 N.E.2d 352 (1960); Parker v. Kirkland, 298 Ill. App. 340, 18 N.E.2d 709 (1939); Creitz v. Bennett, 273 Ill. App. 88 (1933).

74. 24 Ill. 2d 437, 181 N.E.2d 105, *cert. denied*, 371 U.S. 877 (1962).

75. *Id.* at 442, N.E.2d at 108. The court did not deal with the question of whether words that are not defamatory are still actionable as lible per quod if the plaintiff can show special damages. This caused confusion in later courts applying *John*. *See* American Pet Motels, Inc. v. Chicago Veterinary Medical Assn., 106 Ill. App. 3d 626, 435 N.E.2d 1297 (1982); Newell v. Field Enter., 91 Ill. App. 3d 735, 415 N.E.2d 434 (1980). In general, in defamation actions, it is a question of law whether certain words are capable of a defamatory meaning, and it is a question of fact for the jury whether the words were understood in a defamatory sense. The effect of the innocent construction rule is to take words away from the jury if they are liable to an innocent construction and thus nonactionable as a matter of law. *See The Illinois Doctrine, supra* note 3, at 526.

76. *Id.* at 439, 181 N.E.2d at 106.

landlord.[77]

The Illinois Supreme Court ruled in favor of the Tribune Company.[78] The court reasoned that when the term "alias" or "also known" is used in a publication, the first name given is the subject of the publication.[79] The alias names cannot be read as "of and concerning" the subject of the publication.[80] In adopting the innocent construction rule, the court in *John* relied solely on Illinois appellate court decisions[81] and decisions of federal courts interpreting Illinois law.[82] Not only did the Illinois Supreme Court not cite any of its prior decisions in support of the innocent construction rule, it completely ignored its prior decisions which had rejected the adoption of such a rule.[83]

Although the Illinois Supreme Court did not have any strong precedent for establishing the innocent construction rule, there were policy reasons for it. In 1962, defamation law had a pro-plaintiff bias.[84] For example, while truth was a defense to an action for defamation, the presumption that an allegedly defamatory statement was false was difficult to rebut, and malice had been irrebuttably presumed.[85] Furthermore, if the plaintiff had been damaged, the defendant was liable in certain circumstances even though his conduct was completely innocent.[86] Therefore, strict liability existed in defamation law.[87] Also, if the publication was written or if the alleged harm fell into one of the slander *per se*[88] categories, damages were presumed.[89]

Defamation Law in Illinois after John

Since the Illinois Supreme Court decision in *John*, Illinois appellate courts and federal courts sitting in Illinois have followed what they considered to be the innocent construction rule as announced in *John*.[90] The Illinois Supreme Court had also reaffirmed the rule in its later

77. *Id.* at 440, 181 N.E.2d at 107. This has been considered one of the greatest coincidences in a reported libel case. *The Illinois Doctrine, supra* note 3, at 527.

78. 24 Ill. 2d at 442, 181 N.E.2d at 108.

79. *Id.* at 442, 181 N.E.2d at 108.

80. *Id.*

81. *See* cases cited at 24 Ill. 2d at 442-43, 181 N.E.2d at 108.

82. *See* cases cited at 24 Ill. 2d at 442, 181 N.E.2d at 108.

83. *Id.* at 442, 181 N.E.2d at 108.

84. *See The Illinois Doctrine, supra* note 3, at 527.

85. 24 Ill. 2d at 442, 181 N.E.2d at 108.

86. *Id.* at 442, 181 N.E.2d at 108.

87. *See* Gertz v. Robert Welch, Inc., 418 U.S. 322 (1974). *See also infra* notes 128-30 and accompanying text.

88. *See infra* note 96.

89. *The Illinois Doctrine, supra* note 3, at 527.

90. *See, e.g.*, Rasky v. Columbia Broadcasting System, Inc., 103 Ill. App. 3d 577, 431 N.E.2d 1055 (1981); Makis v. Area Publications Corp., 77 Ill. App. 3d 452, 395 N.E.2d 1185 (1979); Loril-

decisions.[91]

According to the interpretations given to the rule in *John*, an innocent construction will be given to an allegedly defamatory statement if the words are susceptible of it or if the statement is ambiguous.[92] The rule has been held to apply to both libel[93] and slander[94] actions. Courts have held that under the innocent construction rule, in order for a declaration to be libel *per se*,[95] it must be read in the best possible light[96] and stripped of innuendo.[97] The innocent construction rule had also been applied to issues of colloquium[98] when the plaintiff alleged that the defamatory statement was "of or concerning" him.[99] Furthermore, the rule has been held to apply even when the defendant made the statement maliciously.[100]

Since the adoption of the innocent construction rule, Illinois courts would frequently go to great lengths to find an innocent interpretation. For example, the Illinois Supreme Court held that the statement "he was a lousy agent" was not slanderous *per se* because it could be construed innocently to mean that the "plaintiff did not properly or satisfactorily represent the company and that there had been a 'lousy' or generally unsatisfactory agency relationship."[101] The court stated that

lard v. Field Enters., 65 Ill. App. 2d 65, 213 N.E.2d 1 (1965); Porcella v. Time, Inc., 300 F.2d 162 (7th Cir. 1962); Cantrell v. American Broadcasting Cos., Inc., 529 F. Supp. 746 (N.D. Ill. 1981).

91. *See, e.g.*, Catalano v. Pechous, 83 Ill. 2d 146, 419 N.E.2d 350 (1980), *cert. denied* 451 U.S. 911 (1980); Troman v. Wood, 62 Ill. 2d 184, 390 N.E.2d 292 (1975); Valentine v. North Am. Co. for Life & Health Ins., 60 Ill. 2d 168, 328 N.E.2d 265 (1974).

92. *See* Altman v. Amoco Oil Co., 85 Ill. App. 3d 104, 406 N.E.2d 142 (1980).

93. *See, e.g.*, Zeinfeld v. Hayes Freight Lines, Inc., 41 Ill. 2d 354, 243 N.E.2d 217 (1968).

94. *See, e.g.*, Valentine v. North Am. Co. for Life & Health Ins., 60 Ill. 2d 168, 328 N.E.2d 265 (1974).

95. For a declaration to be ruled as libelous *per se*, it must be false or so obviously damaging to the plaintiff that proof of injurious character can be and is dispensed with. Reed v. Albanese, 78 Ill. App. 2d 53, 223 N.E.2d 419 (1966). If the statement is not libelous *per se*, it can be ruled libelous *per quod* if the plaintiff can prove up special damages. Kirk v. Village of Hillcrest, 31 Ill. App. 3d 1063, 335 N.E.2d 535 (1975). In most states, libel *per quod* can be proved by innuendo from extrinsic evidence. In Illinois, however, the innocent construction rule does not permit the use of innuendo.

Libel per se is often defined by the categories that defined slander per se at common law: words that impute (1) the commission of a criminal offense or; (2) an infection with a communicable disease which, if true, would exclude one from society or; (3) inability to perform or want of integrity in the discharge of duties of office or employment or; (4) are such as to prejudice a particular person in his profession or trade. Kirk v. Village of Hillcrest, 31 Ill. App. 3d 1063, 335 N.E.2d 535 (1975).

96. Wexler v. Chicago Tribune Co., 69 Ill. App. 3d 610, 387 N.E.2d 892 (1979).

97. Moricoli v. Schwartz, 46 Ill. App. 3d 481, 361 N.E.2d 74 (1977).

98. *See supra* note 34.

99. John v. Tribune Co., 24 Ill. 2d 437, 181 N.E.2d 105, *cert. denied*, 371 U.S. 877 (1962); Belmonte v. Rubin, 68 Ill. App. 3d 700, 386 N.E.2d 904 (1979).

100. *See* Altman v. Amoco Oil Co., 85 Ill. App. 3d 104, 406 N.E.2d 142 (1980).

101. Valentine v. North Am. Co. for Life & Health Ins., 60 Ill. 2d 168, 171, 328 N.E.2d 265, 267 (1974).

the statement in context does not imply that the plaintiff was unqualified or unskilled in his profession.[102]

An appellate court held that labeling plaintiffs as "rip-off speculators" was not libelous *per se*.[103] According to the court, the statement could be read innocently with "rip-off" meaning "exploitation" and "speculators" as referring to someone who had entered a "business transaction or other venture from which the profits, return of investment, capital, or other goods are conjectural."[104]

In another case where the plaintiff had been referred to as a "slum landlord" or "slumlord," the court held that the statement could be innocently construed to mean that the "plaintiff owned buildings in a poor and dirty neighborhood" and thus was nonactionable.[105]

While all of the Illinois courts since *John* have followed the innocent construction rule, the rule received criticism, especially in recent years.[106] Some courts had, in effect, unintentionally modified the innocent construction rule by demanding that an innocent interpretation be given a statement only when the words are reasonably susceptible of it.[107] For example, in *Moricoli v. Schwartz*,[108] an Illinois appellate court refused to apply the innocent construction rule where the plaintiff had been referred to as a "fag."[109] The court stated that the term "fag," when used as a noun in the United States, is "reasonably susceptible" of only one meaning, which is that the person is a homosexual.[110] The court reasoned that to suggest a different meaning[111] would serve only "to further tax the court to espouse a naiveté unwarranted under the circumstances."[112]

In some appellate cases there had been indications that Illinois' innocent construction rule was thought to be in need of review, but these courts held that the Illinois Supreme Court was the proper forum

102. *Id.* at 171, 328 N.E.2d at 267.

103. Bruck v. Cincotta, 56 Ill. App. 3d 260, 265, 371 N.E.2d 874, 878 (1977).

104. *Id.* at 265, 371 N.E.2d at 878.

105. Rasky v. Columbia Broadcasting System, Inc., 103 Ill. App. 3d 577, 582, 431 N.E.2d 1055, 1058 (1981).

106. *See generally* Polelle, *supra* note 25.

107. *See, e.g.*, Tunney v. American Broadcasting Co., 109 Ill. App. 3d 769, 441 N.E.2d 86 (1982); Makis v. Area Publications Corp., 77 Ill. App. 3d 452, 395 N.E.2d 1185 (1979); Moricoli v. Schwartz, 46 Ill. App. 3d 481, 361 N.E.2d 74 (1977); Roemer v. Zurich Ins. Co., 25 Ill. App. 3d 606, 323 N.E.2d 582 (1975).

108. 46 Ill. App. 3d 481, 361 N.E.2d 74 (1977).

109. *Id.* at 482-83, 361 N.E.2d at 76.

110. *Id.*

111. The court consulted WEBSTER'S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (unabridged ed. 1966) which gave several other definitions of the word "fag" such as "cigarette," "to become weary," "a fatiguing task." *Id.* at 483, 361 N.E.2d at 75.

112. *Id.* at 483, 361 N.E.2d at 76.

for a revision of the rule.[113] In a 1982 appellate decision, the court stated that the innocent construction rule was "unsettled" and the court mentioned that it had certain reservations concerning the rule.[114] The court, thus, chose to decide the case on other grounds.[115]

The innocent construction rule, however, serves some beneficial ends. The main argument for its support is that the innocent construction rule encourages "the robust discussion of daily affairs" and it reduces litigation.[116] Another important benefit is that the innocent construction rule comports with the constitutional concerns of encouraging freedom of expression.[117] Furthermore, it has been asserted that free speech is not limited to compliments.[118] If this were not the case, it was felt, there would be "no meaningful exchange of ideas."[119] It was believed that "members of a free society must be able to express candid opinions and make personal judgments. And those opinions and judgments may be harsh or critical—even abusive—yet still not subject the speaker or writer to civil liability."[120]

Constitutional Protections in Defamation Law

Since 1962, many changes have taken place in the area of defamation law, outside of the innocent construction rule. These changes have aided defendants in defamation actions and have given defendants some of the protections that they did not have when the court decided *John.* In 1964, in the landmark case of *New York Times Co. v. Sullivan,*[121] the United States Supreme Court held that the Constitution requires a public official to prove with "convincing clarity" that an

113. Makis v. Area Publications Corp., 77 Ill. App. 3d 452, 395 N.E.2d 1185 (1979); Vee See Constr. Co. v. Jensen & Halstead Ltd., 79 Ill. App. 3d 1084, 399 N.E.2d 79 (1979).

114. American Pet Motels, Inc. v. Chicago Veterinary Medical Ass'n., 106 Ill. App. 3d 626, 630-31, 435 N.E.2d 1297, 1301 (1982).

115. *Id.* at 630-31, 435 N.E.2d at 1301. The court affirmed summary judgment for the defendants on the grounds of conditional privilege. *Id.* at 634, 435 N.E.2d at 1303. *See also* Allen v. Ali, 105 Ill. App. 3d 887, 435 N.E.2d 167 (1982), where the court refused to rely on the innocent construction rule.

116. Dauw v. Field Enters., 78 Ill. App. 3d 67, 71, 397 N.E.2d 41, 44 (1979).

117. *Id.* at 71, 397 N.E.2d at 44.

118. Sloan v. Hatton, 66 Ill. App. 3d 41, 42, 383 N.E.2d 259, 261 (1978).

119. *Id.*

120. *Id. See also* Byars v. Kolodziej, 48 Ill. App. 3d 1015, 1017, 363 N.E.2d 628, 629 (1978), where the court held that not every expression of opinion about a person's capabilities or qualifications constitute a defamation even though the subject may be severely injured in his own conception.

121. 376 U.S. 254 (1964). The *New York Times* case arose out of a civil rights demonstration in Alabama. The Times published a paid advertisement which was signed by a number of prominent individuals. The advertisement accused the police of misconduct in dealing with the demonstration. Sullivan, the police commissioner, brought an action for libel, alleging that he was personally defamed as one of the persons responsible for the demonstration.

allegedly defamatory publication was made with "actual malice" before he can recover damages.[122] "Actual malice" was defined by the Court to require that the statement was made with "knowledge that it was false or with reckless disregard of whether it was false or not."[123] This rule was based on the free speech and free press guarantees required by the first amendment.[124] The *New York Times* rule was made applicable to the states through the fourteenth amendment.[125] The Court feared that without the rule, public criticism would be hampered and the media would engage in self-censorship.[126]

Another important United States Supreme Court case on defamation was the 1974 decision of *Gertz v. Robert Welch, Inc.*[127] The Court affirmed the *New York Times* rule as applied to public officials and public figures, but held that the "state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them."[128] In *Gertz*, the Court established that statements made about matters of general or public interest were not deserving of constitutional protection. The Court held that "as 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."[129]

In 1975, the Illinois Supreme Court for the first time since the United States Supreme Court's decision in *Gertz*, was faced with a libel action brought by a private individual arising out of an event in the public interest in *Troman v. Wood*.[130] The *Troman* Court recognized that *Gertz* gave them the authority to choose whatever standard of liability for private plaintiffs it wanted as long as the court did not impose liability without fault; thus, the Illinois Supreme Court decided to adopt a negligence standard for libel actions in these circumstances.[131] The court believed that a negligence standard adequately protected the interest of a free press while at the same time allowed the individual to

122. *Id.* at 279-80.
123. *Id.*
124. *Id.* at 264.
125. *Id.*
126. *Id.* at 269. In 1967, the Supreme Court extended the actual malice test to public figures. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
127. 418 U.S. 322 (1974).
128. *Id.* at 343.
129. *Id.* at 347.
130. 62 Ill. 2d 184, 340 N.E.2d 292 (1975).
131. *Id.* at 197, 340 N.E.2d at 298.

vindicate his good name.[132] The question under the standard of ordinary negligence is whether the defendant had reasonable grounds to believe that his statement was true.[133] The court further held that negligence may form the basis of liability for private plaintiffs regardless of whether the publication related to a matter of public or general interest.[134]

CHAPSKI V. COPLEY PRESS

Facts of the Case

In *Chapski*, the libel action arose out of a series of newspaper articles which appeared in the *Dailey Courier News*, a local Elgin, Illinois, newspaper, during the period of February 8, 1979, through January 25, 1980.[135] There were thirteen articles published on eleven different dates. Most of the articles purported to summarize and clarify the judicial proceedings and events which preceded the death on February 2, 1979, of Kristie Hubbard, a two-year-old victim of child abuse. Plaintiff, Robert A. Chapski, an attorney, represented Kathleen Hubbard, the child's mother, in juvenile and divorce proceedings. Chapski also represented Norman Platter, the mother's boyfriend who was accused in the beating death of the child.[136]

Chapski alleged in his eleven count complaint that the defendants[137] "seized upon this unfortunate set of circumstances to wrongfully and maliciously and with intent to defame and injure the plaintiff in his reputation, caused to be published [in the *Daily Courier News*] false, defamatory, libelous articles and editorials."[138]

The first article, titled "Child Custody Battle Sad as Child's Death Itself," stated that the custody hearing which gave custody of the child to her mother was "impromptu" and was attended by only the child's mother and Chapski.[139] The article also quoted an assistant public defender as saying "it's my feeling that when an attorney comes in with a motion that will affect the status of the case, court procedures require

132. *Id.*
133. *Id.*
134. *Id.*
135. Chapski v. Copley Press, 92 Ill. 2d 344, 345, 442 N.E.2d 195, 196 (1982).
136. *Id.* at 345-46, 442 N.E.2d at 196.
137. *See infra* text accompanying note 160.
138. Chapski v. Copley Press, 100 Ill. App. 3d 1012, 1013, 427 N.E.2d 638, 639 (1981), *rev'd and rem'd*, 92 Ill. 2d 344, 442 N.E.2d 195 (1982).
139. Appellant's Petition for Leave to Appeal at 7, Chapski v. Copley Press, 92 Ill. 2d 344, 442 N.E.2d 195 (1982).

proper notice to other parties."[140]

Another article accused Chapski of manipulating the court proceedings in September 1978 to get the child's custody awarded to her mother.[141] The article rhetorically asked a series of questions implying that Chapski was acting immorally or unethically.[142]

The *Courier News* also printed an article titled, "Who's To Blame? Many Questions in Baby's Death."[143] The article accused Chapski of not giving proper notice about the custody hearing to the attorneys who represented Mr. Hubbard, the child's father.[144] The paper quoted Mr. Hubbard's attorney as making indirect reference to Chapski when he said, " 'I think in custody cases a lawyer has a responsibility to human life above that to his client. I also think that we as lawyers have an obligation to the Court to see that justice is done.' "[145] The article also quoted Mr. Hubbard's attorney as advising Mr. Hubbard to get local counsel because "he felt someone was 'going in the back door in Kane County.' "[146]

The article titled "To Clear the Record" purported to summarize the events reported in previously published articles, and it accused Chapski of not following several procedures involved in custody hearings.[147] The article also stated that "it is agreed he had no legal requirement to do any of these things. Every lawyer contacted by me said they would assume a moral obligation to do so."[148]

The article titled "Legal Report Card: F" discussed the Kristie Hubbard case as well as the experiences of five attorneys "with a shaky legal system that condones any lawyer who skirts the ethics of their [sic]

140. Appellant's Petition for Leave to Appeal at 7. The February 9, 1979, article stated that Chapski, after being refused a bond reduction for Norman Platter from one judge, said he would file motions in another court for reduction. The article also stated that in August 1978 the custody of the child had been taken from Mrs. Hubbard "reportedly because of abuse of the child by Platter," but in September the child had been returned to her mother in an "unscheduled hearing." *Id.*

141. *Id.*

142. *Id.* The article asked:

> Could he not have known of the abuse already testified to and which was repeated days later before Judge Joseph McCarthy, who as part of the mother's divorce proceeding was deciding on the custody of the child? Can it be there was no legal responsibility for Chapski to inform McCarthy of the alleged abuse? No moral obligation? Is this the way the law is supposed to work or does the designation "officer of the court" place some responsibility on attorneys to serve all those under jurisdiction of the court as well as their own client.

143. *Id.*

144. *Id.*

145. *Id.* at 9.

146. *Id.*

147. *Id.*

148. *Id.*

profession."[149] The article further quoted one lawyer as saying that the Kristie Hubbard case is " 'the culmination of several years of these shenanigans,' " . . . "This has been going on continually. Now it's gone too far. Somebody's dead.' "[150]

Chapski claimed that the various articles implied that he "was guilty of a violation of the law, morals and integrity, whereas in truth, he was guilty of no such violations."[151] Chapski also contended that at the time of the publication of the articles the defendants knew or by exercise of reasonable care could and would have known that the statements they made concerning him were false.[152] In support of his assertion that the articles were false, Chapski stated that the court had granted custody to his client on September 14, 1978, when all parties and their attorneys were present before the court.[153] The official police report confirmed that custody had been awarded to Mrs. Hubbard on September 14, 1978, and not September 21, 1978.[154]

A group of local citizens formed in response to the article published in the *Daily Courier News*,[155] which prompted the Attorney Registration and Disciplinary Commission to conduct hearings. The commission found Chapski to be innocent of the various accusations made by the defendants.[156] On January 25, 1980, the defendants received a copy of the commission's opinion and had an opportunity to retract the allegedly false and libelous statements.[157] The defendants instead published another article about Chapski which stated, "The bar association asked for the investigation after several area attorneys ques-

149. *Id.* at 10.

150. *Id.* On Feb. 28, 1979, an article was published which included the following quotation, "Citing evidence of abuse, a 16th Circuit Court Judge had ordered the girl taken from her mother's custody, but the child was returned in an unscheduled hearing before another Judge a short time later. . . . Several lawyers have questioned the propriety of that unscheduled hearing." *Id.*

On March 9, 1979, the newspaper reported that the Attorney Registration and Disciplinary Commission was investigating a complaint about Chapski's conduct during court proceedings preceding the child's death. The article compared the first step in the investigation, review by an inquiry board, to a grand jury in a criminal proceeding. *Id.* at 10-11.

The articles published on June 27, 1979, and September 30, 1979, implied that Chapski was responsible for the child's death because of the way he represented Mrs. Hubbard in the various court proceedings. The article also made further mention of the "unscheduled hearings." *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 12.

154. *Id.*

155. *Id.* A group of people formed "The Concerned Citizens for Kristies" as a response to the article in the *Daily Courier News*. Chapski alleged that this group aided and abetted the defendants' cause to defame plaintiff's character and reputation by writing to various Illinois state authorities including the Attorney Registration and Disciplinary Commission of Illinois. *Id.*

156. *Id.* at 13.

157. *Id.*

tioned the propriety of the legal proceedings which gave Kristie back to Mrs. Hubbard's care."[158]

Chapski filed the libel action in the Circuit Court of Kane County, seeking damages against defendants, the Copley Press, the *Daily Courier News*, an editor and publisher, a reporter, and the editor.[159]

Lower Courts' Opinions

The trial court applied the innocent construction rule to the alleged defamatory statements and declared them nonactionable as a matter of law.[160] The court stated that the main thrust of the articles was directed to and critical of the court system as it related to the custody proceedings of Kristie Hubbard.[161] The court further stated that in the articles the defendants did not charge Chapski with any illegal acts nor did they suggest Chapski's incompetence in his profession as an attorney—which would be actionable.[162] The court concluded that the articles were merely a constitutionally protected free expression of the opinion of the defendants that "justice was not served" due to the manner in which the custody proceedings were conducted and the manner in which Chapski was allowed to represent his client because of the failing of the court system.[163] The court granted defendants' motion to dismiss.[164]

The Appellate Court for the Second District of Illinois affirmed the decision of the trial court.[165] The appellate court applied the innocent construction rule to the allegedly defamatory statements and determined that they were susceptible of being construed innocently.[166] The court stated that characterizing the hearing as "impromptu" could be construed as a criticism of the court system rather than the plaintiff.[167] According to the court, the quotation from the assistant public defender which alleged that proper notice was not given[168] was critical of the judge and not the plaintiff.[169]

The article which accused Chapski of manipulating the court sys-

158. *Id.* at 14.
159. *Id.*
160. Chapski v. Copley Press, No. 80 L 82 at 6.
161. *Id.* at 4.
162. *Id.* at 6.
163. *Id.*
164. *Id.* at 7.
165. 100 Ill. App. 3d at 1020, 427 N.E.2d at 644.
166. *Id.* at 1016-20, 427 N.E.2d at 641-42.
167. *Id.* at 1017, 427 N.E.2d at 642.
168. *See supra* note 141 and accompanying text.
169. 100 Ill. App. 3d at 1017, 427 N.E.2d at 642.

tem,[170] according to the court, merely inquired whether plaintiff had any legal or moral responsibility to do certain things, but did not accuse him of any impropriety.[171] The accusation that Chapski did not give the other attorney proper notice was construed innocently because the statement did not accuse Chapski of a deliberate failing.[172] The statement "he felt someone was going in the back door in Kane County"[173] was held by the appellate court to be ambiguous and thus nonactionable.[174] The article entitled "To Clear the Record . . . "[175] was construed innocently because although it stated that some lawyers would assume a moral obligation, it did not imply that Chapski lacked integrity for failing to do so.[176] The court held that the article entitled "Legal Report Card: F"[177] was a criticism of the legal system and not Chapski.[178] Furthermore, the court held that the title of that article was an opinion and therefore not actionable.[179]

Illinois Supreme Court Opinion

The Illinois Supreme Court reversed the appellate and circuit courts and remanded the case to the Circuit Court of Kane County.[180] In reaching its decision, the court traced the innocent construction rule in Illinois since its adoption in *John*.[181] The court noted that the rule, as stated in *John*, was merely *obiter dictum*.[182] Furthermore, the court stressed that since that time the rule had been applied frequently in the Illinois appellate courts, the Illinois Supreme Court, and federal courts sitting in Illinois but not in a uniform fashion.[183] The court found that

170. *See supra* notes 142-43 and accompanying text.
171. 100 Ill. App. 3d at 1017-18, 427 N.E.2d at 642.
172. *Id.* at 1018, 427 N.E.2d at 643.
173. *See supra* note 147 and accompanying text.
174. 100 Ill. App. 3d at 1018, 427 N.E.2d at 643.
175. *See supra* notes 148-49 and accompanying text.
176. 100 Ill. App. 3d at 1018, 427 N.E.2d at 643.
177. *See supra* notes 150-51 and accompanying text.
178. 100 Ill. App. 3d at 1018-19, 427 N.E.2d at 643.
179. *Id.*
180. 92 Ill. 2d at 352, 442 N.E.2d at 198.
181. *Id.* at 346-49, 442 N.E.2d at 197.
182. *Id.* at 347, 442 N.E.2d at 196. *Obiter dictum* refers to words of an opinion which are not necessary for the decision of the case and are not binding as precedent. BLACK'S LAW DICTIONARY 967 (5th ed. 1979). In other words, the innocent construction rule was not the holding of *John*.
183. 92 Ill. 2d at 348, 442 N.E.2d at 196-97. *See, e.g.*, Rasky v. Columbia Broadcasting System, Inc., 103 Ill. App. 3d 577, 431 N.E.2d 1055 (1981); Newell v. Field Enters., Inc., 91 Ill. App. 3d 735, 415 N.E.2d 434 (1980); Garber-Pierre Food Prods., Inc. v. Crooks, 78 Ill. App. 3d 356, 397 N.E.2d 211 (1979); Makis v. Area Publications Corp., 77 Ill. App. 3d 452, 395 N.E.2d 1185 (1979); Bruck v. Cincotta, 56 Ill. App. 3d 260, 371 N.E.2d 874 (1977); Moricoli v. Schwartz, 46 Ill. App. 3d 481, 361 N.E.2d 74 (1977); Watson v. Southwest Messenger Press, Inc., 12 Ill. App. 3d 968, 299 N.E.2d 409 (1973); Delis v. Sepsis, 9 Ill. App. 3d 217, 292 N.E.2d 138 (1972); Lorillard v. Field

the rule had often been applied over vigorous objections.[184] The court also found that the innocent construction rule had been applied to both libel[185] and slander,[186] to the determination of whether the language is actionable *per se*,[187] and to the use of colloquium.[188] The court also noted that several commentators had criticized the innocent construction rule[189] and that such a rule exists in only a few states.[190]

In its analysis, the Illinois Supreme Court stated that the justifications for the innocent construction rule include the desirable effects of mitigating the harshness of the doctrine of strict liability which existed in defamation law prior to *Gertz v. Robert Welch, Inc.*,[191] and, more important, the rule also "comports with the constitutional interests of free speech and free press and encourages the robust discussion of daily affairs."[192]

The principal criticism of the rule, the court emphasized, is that, like the *mitior sensus* doctrine, "courts generally strain to find unnatural but possibly innocent meanings of words where such a construction is clearly unreasonable and a defamatory meaning is far more probable."[193] Construing a publication in an "unreasonable manner" so as to give it an innocent interpretation, the court emphasized, is "incompatible with the rule's requirement that words be given their 'natural and obvious meaning.' "[194] The court noted that this conflict which is contained in the definition itself had been resolved in some cases, "per-

Enters., Inc., 65 Ill. App. 2d 65, 213 N.E.2d 1 (1965); *see also* Porcella v. Time, Inc., 300 F.2d 162 (7th Cir. 1962); Cantrell v. American Broadcasting Cos., Inc., 529 F. Supp. 746 (N.D. Ill. 1981).

184. *See, e.g.*, Levinson v. Time, Inc., 89 Ill. App. 3d 338, 411 N.E.2d 1118 (1980); Kakuris v. Klein, 88 Ill. App. 3d 597, 410 N.E.2d 984 (1980); Vee See Constr. Co. v. Jensen & Halstead, Ltd., 79 Ill. App. 3d 1084, 399 N.E.2d 278 (1979); Makis v. Area Publications Corp., 77 Ill. App. 3d 452, 395 N.E.2d 1185 (1979).

185. *See, e.g.*, Zeinfeld v. Hayes Freight Lines, Inc., 41 Ill. 2d 345, 243 N.E.2d 217 (1968).

186. *See, e.g.*, Valentine v. North Am. Co. for Life & Health Ins., 60 Ill. 2d 168, 328 N.E.2d 265 (1974).

187. Makis v. Area Publications Corp., 77 Ill. App. 3d 452, 395 N.E.2d 1185 (1979).

188. John v. Tribune Co., 42 Ill. 2d 437, 181 N.E.2d 105, *cert. denied*, 371 U.S. 877 (1962); Belmonte v. Rubin, 68 Ill. App. 3d 700, 386 N.E.2d 904 (1979).

189. *See, e.g.*, Polelle, *supra* note 25; *Libel and Slander, supra* note 18; *The Illinois Doctrine, supra* note 3; Stonecipher & Trager, *The Impact of Gertz on the Law of Libel in Illinois*. S. ILL. U.L.J. 73 (1979).

190. The rule or variations thereof remain the law in only a few states. 92 Ill. 2d at 348, 442 N.E.2d at 196-97. *See* Monnin v. Wood, 86 N.M. 460, 525 F.2d 387 (1974); Walker v. Kansas City Star Co., 406 S.W.2d 44 (Mo. 1966); Steffes v. Crawford, 143 Mont. 43, 386 P.2d 842 (1963); Becker v. Toulmin, 165 Ohio 549, 183 N.E.2d 391 (1956); Tulsa Tribune Co. v. Kight, 74 Okla. 359, 50 P.2d 350 (1935); *see also* England v. Automatic Canteen Co. of America, 349 F.2d 989 (6th Cir. 1966).

191. 418 U.S. 323 (1974).

192. 92 Ill. 2d at 350, 442 N.E.2d at 198.

193. *Id.* at 350-51, 442 N.E.2d at 198.

194. *Id.* at 351, 442 N.E.2d at 198.

haps unwittingly," by applying the innocent construction rule only where the words are "reasonably susceptible" of an innocent construction or when the allegedly defamatory language is ambiguous.[195] The court concluded that, because of the inconsistencies, inequities, and confusion that have resulted from the interpretations and applications of the rule as originally announced in *John*, and the broader protections that now exist to protect first amendment interests along with the availability of the various privileges,[196] it was persuaded that a modification of the innocent construction rule was necessary.[197] A modification of the rule, according to the court, would better serve to protect the individual's interest in vindicating his good name and reputation while allowing the "breathing space" necessary for the beneficial exercise of the first amendment guarantees.[198]

The court, thus, held that:

> [A] written or oral statement is to be considered in context, with the words and the implications therefrom given their natural and obvious meaning; if, as so construed, the statement may *reasonably* be innocently interpreted or *reasonably* be interpreted as referring to someone other than the plaintiff it cannot be actionable *per se*.[199]

The court added that this is a preliminary determination which is a question of law to be resolved by the court. Should the initial determination be resolved in favor of the plaintiff, the court continued, the question of whether the publication was in fact understood to be defamatory or to refer to the plaintiff is decided by the jury.[200]

The Illinois Supreme Court determined that *Chapski* should be remanded to the trial court which will apply the modified rule. The court reasoned that since several opinions of the appellate courts have in essence applied the modified rule, it would not be unfair, as the defendants alleged, to apply it in *Chapski*. The court further noted that the trial court, in applying the innocent construction rule, treated some of the language as a constitutional expression of opinion. The court pointed out, however, that the innocent construction rule requires language to be treated as opinions only when that characterization is a

195. *Id. See, e.g.*, Altman v. Amoco Oil Co., 85 Ill. App. 3d 104, 406 N.E.2d 142 (1980).

196. *See supra* notes 122-30 and accompanying text. For the various privileges, see Colson v. Stieg, 89 Ill. 2d 205, 443 N.E.2d 246 (1982); Blair v. Walker, 64 Ill. 2d 1, 349 N.E.2d 385 (1976); Farnsworth v. Tribune Co., 43 Ill. 2d 286, 253 N.E.2d 408 (1969); Zeinfeld v. Hayes Freight Lines, Inc., 41 Ill. 2d 345, 243 N.E.2d 217 (1968); *see also* Catalano v. Pechous, 83 Ill. 2d 146, 419 N.E.2d 350 (1980), cert. denied, 451 U.S. 911 (1980).

197. 92 Ill. 2d at 351, 442 N.E.2d at 198.

198. *Id.*

199. *Id.* at 352, 442 N.E.2d at 199.

200. *Id.*

reasonable one.[201]

ANALYSIS

Actions for defamation involve several important and competing interests. The interests of plaintiffs in vindicating their good names must be weighed by the courts against the defendants' constitutionally protected rights of free speech and free press along with the general public's interest in receiving information of public concern. The general public also has an interest in being exposed to a variety of different viewpoints and opinions. The United States Supreme Court has made several attempts to reach an equitable balance of these interests as seen in *New York Times* and its progeny, and in *Gertz*.[202]

Illinois has also attempted to deal with the competing interests inherent in defamation actions. The Illinois Supreme Court responded to the *Gertz* directive in *Troman* and held that private individuals must show negligence on the part of a defendant in making a defamatory statement. While at first glance it might appear that Illinois was being very sympathetic to plaintiffs, it must be emphasized that since 1962, Illinois, unlike most other states, had the innocent construction rule which made it very difficult for a plaintiff to prove that an allegedly defamatory statement was even actionable.

The innocent construction rule had a curious beginning in Illinois. It was used in some Illinois appellate courts before the Illinois Supreme Court had adopted it and at a time when the Illinois Supreme Court was not only advocating a different rule but had clearly rejected an analysis of the sort associated with the innocent construction rule.[203] Furthermore, three years before Illinois "adopted"[204] the innocent construction rule in 1962, Justice Traynor of the California Supreme Court rejected such a rule in California.[205] The California court stated that an innocent construction rule "protects, not the innocent defamer whose words are libelous, but the clever writer versed in the law of defamation who deliberately casts a grossly defamatory imputation in ambiguous language."[206]

It appears from a close examination of *John* that the Illinois

201. *Id.*
202. *See supra* notes 122-30 and accompanying text.
203. *See supra* notes 22-50 and accompanying text.
204. The rule as announced in *John* was *obiter dictum*. *See* Valentine v. North Am. Co. for Life & Health Ins., 60 Ill. 2d 168, 172, 328 N.E.2d 265, 268 (1974) (Ward, J., dissenting). Later courts did not follow the precise meaning of the words of the rule.
205. Macleod v. Tribune Publishing Co., 52 Cal. 2d 536, 343 P.2d 36 (1959).
206. *Id.* at 550-51, 343 P.2d at 44.

Supreme Court wanted to adopt the innocent construction rule in 1962, so it announced the rule in the first case that was arguably proper for it. In 1962 there were justified policy reasons in favor of adopting an innocent construction rule. It was considered necessary to counter the pro-plaintiff bias that existed in defamation law at that time.[207] The Illinois Supreme Court believed that a defendant in a defamation action needed some protection and that the innocent construction rule would properly balance the competing interests involved in a defamation action.[208]

The innocent construction rule, however, did not succeed in balancing these interests. Justice Traynor's criticisms became applicable in Illinois. Plaintiffs in Illinois since *John* were at a serious disadvantage because courts often went to great lengths to find an innocent construction in an allegedly defamatory statement. As the court in *Chapski* pointed out, such a construction clearly went against the precise meaning of the rule announced in *John*[209] which directed courts to give the words their "natural and obvious" meaning. The innocent construction rule was being applied to allegations of both libel *per se* and libel *per quod*. Many defamation actions, where the plaintiff was more likely than not defamed, therefore, were dismissed without the case ever going before the jury. This result was also contrary to the long established constitutional protection to reputation provided by the United States[210] and Illinois Constitutions.[211] The primary purpose of an action for defamation is the vindication of the plaintiff's good name.[212]

The Illinois Supreme Court realized this dilemma when it decided *Chapski* in 1982. In *Chapski*, the court held that a modification of the innocent construction rule was necessary. This was a proper finding in light of the constitutional protections provided for defendants in defa-

207. *See supra* notes 85-90 and accompanying text.

208. *See supra* notes 117-21 and accompanying text.

209. 92 Ill. 2d at 351, 442 N.E.2d at 198.

210. "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation." Rosenblatt v. Baer, 338 U.S. 75, 86 (1966). The individual's right to the protection of his own good name

> reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basis of our Constitutional system.

Id. at 92 (Stewart, J., concurring), *quoted with approval in* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974). *See also* L. ELDRIDGE, THE LAW OF DEFAMATION 8-9 (1978).

211. *See* Troman v. Wood, 62 Ill. 2d 184, 194, 340 N.E.2d 292, 297 (1975). *See also* ILL. CONST. art. I, §§ 12, 20 (1970).

212. L. ELDRIDGE, *supra* note 211, at 4.

mation actions by *New York Times* and *Gertz* and the confusion associated with the rule as announced in *John*.[213]

The Illinois Supreme Court modified the innocent construction rule announced in *John* by requiring that allegedly defamatory language be given an innocent construction only if it is a reasonable interpretation.[214] As a result, Illinois no longer has an "innocent construction" rule, but a "reasonable innocent construction" rule. The effect of this modification, however, is questionable. The "modified" rule still requires the judge to make the initial determination of whether the allegedly defamatory language can be read innocently and thus be nonactionable. The requirement of a reasonable construction should prevent judges from straining to find an unnatural interpretation of the words. Since the interpretation of the words will be at the discretion of the judge, there is still the possibility of "strained" interpretations made under the guise of reasonableness.

While the modification of the innocent construction rule was necessary, the Illinois Supreme Court did not go far enough in *Chapski*. The court should have taken the opportunity to overrule *John*, get rid of the innocent construction rule and adopt the rule which exists in the majority of states. While both the majority rule[215] and the Illinois rule require the judge to make the initial determination concerning the defamatory nature of the language, the emphasis of that determination is different. Under the majority rule, the judge decides whether the language is reasonably susceptible of a defamatory interpretation, and, if it is, the case goes to the jury despite any conceivable innocent interpretation, to determine whether in fact the publication was understood to be defamatory or to refer to the plaintiff. In contrast, the Illinois rule prevents a case from getting to the jury if there is any possible reasonable innocent interpretation of the language.

The majority rule is the better rule because it achieves a more equitable balance between the competing interests inherent in defamation actions. If a plaintiff can show a defamatory meaning, the statement should go to the jury. The defendant will not be overly burdened by such an approach since he is provided with adequate constitutional protections. Such a rule would encourage the media and others to be more careful in their statements, and the potential for "sloppy"[216] or

213. *See supra* notes 122-30 and accompanying text. *See also* Polelle, *supra* note 25.
214. 92 Ill. 2d at 352, 442 N.E.2d at 199.
215. *See supra* note 48.
216. *See* Chi. Law., Dec. 1982, at 5, col. 1.

cleverly written[217] journalism would decrease because the majority rules lessens the possibility of keeping ambiguous language—that which could reasonably be read as being innocent or defamatory—from the jury. By allowing plaintiffs the right to a jury trial, the majority rule aids in the vindication of the plaintiffs' good name and reputation without acting as a censoring device on the media.

The "modification" of the rule, however, could be the beginning of the end of innocent construction in Illinois. Several Illinois appellate level decisions that preceded the Illinois Supreme Court decision in *Chapski* indicated a disfavor of the innocent construction rule because of the arbitrary nature of its application in not allowing many allegedly defamatory statements to go to the jury. These courts, however, followed the rule as announced in *John* and waited for the Illinois Supreme Court to change the rule. As the court in *Chapski* pointed out, some of these courts actually applied the rule which was later announced in *Chapski*.[218] Since the Illinois Supreme Court in *Chapski* purported to modify the rule, these appellate courts might look upon the *Chapski* rule as the long awaited change of the innocent construction rule. *Chapski*, thus, could have a significant impact on Illinois defamation law.

Several post-*Chapski* appellate level decisions applying *Chapski* demonstrate the positive and important impact that case will have on Illinois defamation law. It is apparent that most of the these courts see *Chapski* as a restraint on the "free wheeling" discretion of judges and as providing a greater opportunity to have plaintiffs have their cases reviewed by a judge. If Illinois courts continue to apply *Chapski* in this way, the rights of plaintiffs in vindicating their good name will be better served.

In *Costello v. Capital Cities Media, Inc.*,[219] the court refused to find an innocent meaning in an allegedly defamatory statement[220] and stated that *Chapski* precludes judges from making "contorted interpretations of language so that it might be seen as innocent."[221] In *Crinkley v. Dow Jones & Co.*[222] the court indicated that *Chapski* appears to be a

217. *See supra* notes 206-07 and accompanying text.

218. *See supra* cases cited at note 185.

219. 111 Ill. App. 3d 1009, 445 N.E.2d 13 (1982).

220. The alleged libel, which was contained in an editorial, referred to the plaintiff as a liar and included "Jerry Costello lied to us"; "There's no nicer way to put it, he simply lied to us"; "He did absolutely nothing to protect your interests"; "Just think, we've got two more years of the Costello brand of lying leadership." *Id.* at 1011, 445 N.E.2d at 15.

221. *Id.* at 1015, 445 N.E.2d at 17.

222. 119 Ill. App. 3d 147, 456 N.E.2d 138 (1983).

significant change and further signifies the Illinois Supreme Court's move away from the doctrine of *miteor sensus*.[223]

Another post-*Chapski* appellate level decision, *Cartwright v. Garrison*,[224] however, did not construe *Chapski* as an attempt to get rid of the unjust effects of the innocent construction rule in Illinois. In *Cartwright*, the article concerned a closed school board meeting where the plaintiff was the superintendent of the school district and the defendant was a school board member. The article stated that the defendant was presented with a letter at the meeting requesting his resignation and that the letter dealt with his taking information to the state's attorney. The allegedly defamatory language was,

> Whatever legal ramifications result from that investigation—which could range from the superintendent losing his certification to criminal penalties—is up to the state's attorney.
> I think that the public will demand changes once all the information is brought out by the state's attorney.[225]

The court applied *Chapski* and held that the allegedly defamatory language could not reasonably be interpreted as accusing the plaintiff of a crime or imputing unfitness of lack of ability on plaintiff's part.[226] The court, therefore, held that the language was not actionable as a matter of law.[227] It seems apparent that the *Cartwright* court decided the case as it would have before the rule was modified in *Chapski*. In

223. *Id.* at 151, 456 N.E.2d at 141.

The article complained of in *Crinkley* reported a statement made be defendant G.D. Searle and Company in the Wall Street Journal which is published by defendant Dow Jones & Company. The pertinent portion of the article stated:

> In another development, Searle disclosed that two top officers involved in the payment of $1.3 million to agents of foreign governments to win business abroad have resigned. William Owens, a director and group vice-president in charge of the medical instruments division, and Robert Crinkley, president of the radiographics division, quit in early February. A brief reference to Mr. Owens' resignation was in the annual report but the reason wasn't mentioned. A spokesman said the two were the only resignations to result from the disclosures about payoffs.
> In February, after the resignations, Searle told the Securities and Exchange Commission that 'certain members of corporate management were generally aware that some such payments were being made and, in some instances, authorized the arrangements to make payments.'
> In reference to the possibility of a grand jury indictment and conviction, Mr. Searle refused to say that any officer found guilty would be fired. That would depend on 'the nature of the trial and the accusation' he said.

Id. at 148-49, 456 N.E.2d at 139. The court held that the article could reasonably be interpreted as imputing to plaintiff a lack of integrity in the discharge of the duties of his employment and was thus actionable *per se*. *Id.* at 152, 456 N.E.2d at 141.

224. 113 Ill. App. 3d 536, 447 N.E.2d 446 (1983).

225. *Id.* at 538, 447 N.E.2d at 447.

226. *Id.* at 542-43, 447 N.E.2d at 449-50.

227. *Id.* The court further held that the second paragraph of the allegedly defamatory language could be reasonably read as the defendant's opinion. *Id.*

Audition Div. Ltd. v. Better Business Bureau[228] the court noted that before *Chapski*, "Courts had strained to find any innocent construction," but now *Chapski* requires a "reasonable innocent construction."[229] The court, however, found that the reports complained of were reasonably capable of an innocent interpretation.[230]

A further problem with the modified rule in *Chapski* is the meaning the court intended for the words "*per se*." The court stated that if the words can reasonably be read as innocent, they would not be "actionable per se." It is unclear from the opinion if the Illinois Supreme Court means that words not actionable per se would be actionable as libel per quod if a plaintiff could prove special damages.[231] If that is the case, then the Illinois Supreme Court has significantly narrowed the impact of an innocent construction rule because such an interpretation was not the case under the rule as announced in *John*.[232] This would make the rule almost a reasonable construction rule. However, because the court did not overrule *John* such a far reaching interpretation was probably not the intent of the Illinois Supreme Court. Some Illinois courts,[233] though, have concluded that the rule as announced in *Chapski* only applies to libel per se and plaintiffs might have a cause of action if they allege and prove special damages.

228. 120 Ill. App. 3d 254, 458 N.E.2d 115 (1983).

229. *Id.* at 257, 458 N.E.2d at 119.

230. *Id.* at 258, 458 N.E.2d at 119.

The plaintiff in *Audition Div. Ltd.* is a talent and modeling agency for children and adults. The defendant is a not-for-profit corporation which provides verbal and written information to consumers on its member companies (of which plaintiff is one). It also acts as a clearinghouse regarding its members. *Id.* at 255, 458 N.E.2d at 117-18. The reports complained of included a description of the number and types of complaints received by defendant about plaintiff within a particular period and their resolution, if any. Several of the reports advised parents to read and understand the contract before signing. Beginning with the January 1980 report, the defendant also notified consumers that it had been sued by plaintiff. *Id.* at 256-57, 458 N.E.2d at 118.

Plaintiff contended that the reports falsely described its business operation and imply that plaintiff resorted to dishonest methods of soliciting clients. Plaintiff pointed to a series of statements in the reports which were libelous among them misquoted prices, statements that plaintiff does not see children prior to audition, that plaintiff pressures clients to sign contracts and that plaintiff tells parents that their children have a very good chance of working as models. *Id.* at 257, 488 N.E.2d at 118-19. The court held that none of these statements were actionable as libel *per se*. *Id.*

231. *See supra* note 96.

232. *See* American Pet Motels v. Chicago Veterinary Medical Ass'n., 106 Ill. App. 3d 626, 435 N.E.2d 1297 (1982). The court stated that plaintiff's contention that the innocent construction rule does not apply to libel *per quod* is difficult to reconcile with the "sweeping language" the Illinois Supreme Court used in *John* when it adopted the innocent construction rule. *Id.* at 630, 435 N.E.2d at 1301. The court further stated that the rule said "nonactionable as a matter of law," not "nonactionable without proof of special damages." *Id.*

233. *See* Crinkley v. Dow Jones & Co., 119 Ill. App. 3d 147, 456 N.E.2d 138 (1983); Spelson v. CBS, Inc., No. 82C3780, slip op. (N.D. Ill. March 8, 1984); Paul v. Premier Elec. Constr. Co., No. 83C9509, slip op. (N.D. Ill. March 22, 1984).

In light of these post-*Chapski* decisions, it is uncertain what the precise effect of *Chapski* will be. It must be reemphasized that the Illinois Supreme Court in *Chapski* did not go far enough. In order to provide a proper check on judges' discretion, the court should go beyond *Chapski* and overrule any form of the innocent construction rule.[234]

CONCLUSION

The doctrine of innocent construction had an interesting history in Illinois. It was adopted by the Illinois Supreme Court long after that court clearly rejected any form of the common law doctrine of *mitior sensus*. In adopting the rule, the Illinois Supreme Court simply ignored its contrary precedent. The rule, however, served some justifiable ends at the time it was adopted. These justifications no longer make sense in light of *New York Times* and *Gertz*; therefore, the Illinois Supreme Court was proper in reconsidering the innocent construction rule.

The Illinois Supreme Court in *Chapski* modified the innocent construction rule by requiring that the judge give a statement an innocent interpretation only where it is reasonable to do so. While the modification was a step in the right direction, the court should have taken the opportunity to get rid of this rule entirely and line up with the majority of states which say that any statement which can reasonably be read as defamatory goes to the jury. However, the impact of *Chapski* is ques-

234. A possible way of analyzing *Chapski* would be to read it along with Colson v. Stieg, 89 Ill. 2d 205, 433 N.E.2d 246 (1982). In *Colson*, the court found that a university department chairman, in reporting to a tenure committee on a candidate for tenure, was protected by the first amendment privilege announced in *New York Times*. *Id.* at 209, 433 N.E.2d at 249. The court held that it was extending the holding of *New York Times* to a faculty evaluation committee meeting. *Id.* A possible broader reading of *Colson* would be to require any plaintiff to prove malice on the part of a defendant in the publication of a statement of general public interest. Such a reading would overrule *Troman*'s negligence standard for private plaintiffs. The broad reading of *Colson* would be advantageous to Illinois defendants in defamation actions, while *Chapski* increases the right of plaintiffs.

It could be that the Illinois Supreme Court was only willing to make it easier for an allegation of defamation to be actionable and thereby benefit the plaintiff after it had first given the defendant extra protection. The reasonably foreseeable combined result of *Chapski* and *Colson* with this broad reading could be that while more defamation actions get to the jury, plaintiffs will have a more difficult time establishing their prima facie case because proving malice on the part of a defendant is a difficult burden for the plaintiff to meet. Thus, the beneficial impact on plaintiffs may be negligible.

While this is a possible reading of *Colson*, at least one recent appellate court case has not extended *Colson* to all plaintiffs in matters of general public interest. *See* American Pet Motels, Inc. v. Chicago Veterinary Medical Ass'n, 106 Ill. App. 3d 626, 435 N.E.2d 1297 (1982).

For an extensive discussion of *Colson*, see Comment, *Defamation: Extension of New York Times Co. v. Sullivan to Private Litigants*, 59 CHI.-KENT L. REV. 1153 (1983).

tionable since courts which apply the modified rule might use it as a basis for ignoring innocent construction.