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Defamation -- Libel Per Quod and Special Damage

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Defamation—Libel Per Quod and Special Damage

In *Hinsdale v. Orange County Publications, Inc.*,[1] the libelous publication read as follows: "Mr. and Mrs. Paul M. Hinsdale . . . announce the engagement of their son Robert W., to Concetta Kay Reiber. . . ." As it was not mentioned that both plaintiff Hinsdale and Mrs. Rieber were already married to others, the defamatory imputation was only conveyed to readers with knowledge of the facts. The complaints set forth this extrinsic matter but, because no special damage was alleged, were dismissed. The New York Court of Appeals reversed, holding special damage unnecessary as the complaints sufficiently set forth a publication which was libelous per se.

The rule of libel per quod, which the lower courts sought to apply, requires allegation and proof of special damage where a written publication, innocent on its face, is rendered libelous by virtue of extrinsic fact.[2] Such a rule is a stranger to orthodox common law where there is no necessity to plead special damage in any libel action, general damage to reputation being presumed.[3] Libel per se meant actionable per se. It was misinterpretation of the term libel per se to mean libel on its face that led to the development of the per quod rule.[4]

It is where the defamatory meaning of the libel is dependent on extrinsic facts that the rule applies.[5] Two other situations may arise. First, where the publication is defamatory on its face but makes

[1] 17 N.Y.2d 284, 217 N.E.2d 650, 270 N.Y.S.2d 592 (1966).

[2] See Ilitzky v. Goodman, 57 Ariz. 216, 112 P.2d 860 (1941); Karrigan v. Valentine, 184 Kan. 783, 339 P.2d 52 (1959); Campbell v. Post Publishing Co., 94 Mont. 12, 20 P.2d 1063 (1933); Ellsworth v. Martindale-Hubbell Law Directory, Inc., 66 N.D. 578, 268 N.W. 400 (1936).

[3] See Peck v. Chicago Tribune Co., 214 U.S. 185 (1909); Herrmann v. Newark Morning Ledger Co., 48 N.J. Super. 420, 138 A.2d 61 (1958); Kindley v. Privette, 241 N.C. 140, 84 S.E.2d 660 (1954); Roth v. Greensboro News Co., 217 N.C. 13, 6 S.E.2d 882 (1940); Youssoupoff v. Metro-Goldwyn-Mayer Pictures, 50 T.L.R. 581 (C.A. 1934); Thorley v. Lord Kerry, 4 Taunt. 355, 128 Eng. Rep. 367 (C.P. 1812).

[4] For treatment of the development of the rule see Carpenter, *Libel Per Se in California and Some Other States*, 17 So. CAL. L. REV. 347 (1944); Henn, *"Libel-By-Extrinsic-Fact,"* 47 CORNELL L.Q. 14 (1962); Comment, 27 FORDHAM L. REV. 405 (1959); Note, 13 VAND. L. REV. 730 (1960).

[5] In this situation the plaintiff must set out these extrinsic facts in the part of the complaint called the inducement. Its function is to render actionable language which, when standing alone, does not appear injurious of the plaintiff. See PROSSER, TORTS § 106 (3d ed. 1964); TOWNSHEND, SLANDER AND LIBEL §§ 308-15 (2d ed. 1872).

no specific reference to the plaintiff,[6] and, second, where the publication is capable of both an innocent and a defamatory meaning.[7] While some courts have required special damage in these two areas, the per quod rule is properly limited to the extrinsic fact situation.[8]

The rule has received much support in American courts.[9] Dean Prosser,[10] though not undisputed in his claim,[11] asserts that it is now the majority rule and has recommended that the restatement be changed to reflect this.[12] The suggested new section 569 would

[6] In this situation the plaintiff would have to set forth, by way of the colloquium, that the language was written of and concerning him. See PROSSER, TORTS § 106 (3d ed. 1964); TOWNSHEND, SLANDER AND LIBEL §§ 316-23 (2d ed. 1872).

[7] The office of the innuendo is to explain the words in light of the facts and show their defamatory meaning. It is argumentative rather than factual, and cannot be used to introduce new matter, enlarge the sense of the words, or impute to them an unwarranted meaning. See PROSSER, TORTS § 106 (3d ed. 1964); TOWNSHEND, SLANDER AND LIBEL §§ 335-44 (2d ed. 1872).

[8] See Brayton v. Crowell-Collier Publishing Co., 205 F.2d 644 (2d Cir. 1953); MacLeod v. Tribune Publishing Co., 52 Cal. 2d 536, 343 P.2d 36 (1959); Klein v. Sunbeam Corp., 47 Del. 526, 94 A.2d 385 (1952); Everett v. Gross, 22 App. Div. 2d 257, 254 N.Y.S.2d 561 (1964); Marr v. Putnam, 196 Ore. 1, 246 P.2d 509 (1952); RESTATEMENT (SECOND), TORTS § 569(1)(a) and comment *e* (Tent. Draft No. 12, 1966). A publication that needs an inducement is completely innocent on its face, while in the other two situations this degree of innocence is lacking. Where an innuendo is needed, there is a defamatory meaning on the face of the publication. In the colloquium situation the publication is defamatory of some person on its face. This distinction justifies the application of the rule to the inducement situation alone.

[9] The position North Carolina would take on this question is uncertain. In Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938) the court accepted as established law the rule requiring special damage in libel per quod situations. Seventeen years later the court, in Kindley v. Privette, 241 N.C. 140, 84 S.E.2d 660 (1954), refuted the special damage rule, decided the issue in accord with traditional common law principles, and cited old Restatement section 569 with approval. The court also went on to say, 241 N.C. at 144, 84 S.E.2d at 663, that whenever the court used the term libel per se it did so with the meaning actionable per se, not libelous on its face. In Badame v. Lampke, 242 N.C. 755, 89 S.E.2d 466 (1955), a slander case, the court stated the libel per quod rule again and seemed to indicate it applied to slander. For a full discussion of the rule in North Carolina see *North Carolina Case Law—Torts,* 35 N.C.L. REV. 177, 256 (1957); Note, 33 N.C.L. REV. 674 (1955).

[10] PROSSER, TORTS § 170 (3d ed. 1964); Prosser, *Libel Per Quod,* 46 VA. L. REV. 839 (1960); Prosser, *More Libel Per Quod,* 79 HARV. L. REV. 1629 (1966).

[11] Eldredge, *The Spurious Rule of Libel Per Quod,* 79 HARV. L. REV. 733 (1966).

[12] The present section reads:

§ 569 LIABILITY WITHOUT PROOF OF SPECIAL HARM, WHEN IMPOSED —LIBEL.

One who falsely, and without a privilege to do so, publishes matter

require special damage where the libel is dependent on extrinsic facts and does not fall within one of the four classes of slander per se.[13] This assimilation of libel with slander[14] is necessary to avoid a result that would violate the maxim that what is actionable as slander is, a fortiori, actionable as libel.[15]

In New York the rule found its origins in *O'Connell v. Press Publishing Co.*[16] There the court, in unsupported dictum,[17] stated as well established law the rule of libel per quod. The lower New

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defamatory to another in such a manner as to make the publication a libel is liable to the other although no special harm or loss of reputation results therefrom.

RESTATEMENT, TORTS § 569 (1938).

The proposed new section would read:

§ 569 LIABILITY WITHOUT PROOF OF SPECIAL HARM

(1) One who publishes defamatory matter is subject to liability without proof of special harm or loss of reputation if the defamation is

(a) libel whose defamatory innuendo is apparent from the publication itself without reference to extrinsic facts by way of inducement, or

(b) libel or slander which imputes to another

(i) a criminal offense, as stated in § 571

(ii) a loathsome disease, as stated in § 572

(iii) matter incompatible with his business, trade, profession or office, as stated in § 573, or

(iv) unchastity on the part of a woman plaintiff, as stated in § 574.

(2) One who publishes any other defamation is subject to liability only upon proof of special harm, as stated in § 575.

RESTATEMENT (SECOND), TORTS § 569 (Tent. Draft No. 12, 1966).

[13] This proposed change caused much controversy at the last two annual meetings of the American Law Institute. Dean Prosser, whose arguments to the Institute in favor of the change were published in Prosser, *More Libel Per Quod,* 79 HARV. L. REV. 1629 (1966), met with vigorous opposition. Laurence H. Eldredge, a member of the Philadelphia Bar, prepared an exhaustive brief in which he concludes that the vast majority still adhere to the traditional common law rule. The Eldredge brief has also been published, Eldredge, *The Spurious Rule of Libel Per Quod,* 79 HARV. L. REV. 733 (1966).

[14] At common law special damage is required for slander where it is not within one of the arbitrary classes of slander per se. These classes are imputations of (1) a criminal offense, (2) a loathsome disease, (3) matter incompatible with a person's business, trade or profession; or (4) unchastity on the part of a woman. See PROSSER, TORTS § 107 (3d ed. 1964).

[15] [T]o require special damage in all 'libel-by-extrinsic-fact' cases, including those involving imputations of serious crime, loathsome disease, unfitness for one's calling, or unchastity, violates the maxim that any communication which is actionable if so published as to be classifiable as slander is, *a fortiori,* actionable if so published as to be classifiable as libel.

Henn, *Libel-By-Extrinsic-Fact,* 47 CORNELL L.Q. 14, 49 (1962).

[16] 214 N.Y. 352, 108 N.E. 556 (1915).

[17] Henn, *"Libel-By-Extrinsic-Fact,"* 47 CORNELL L.Q. 14, 34 (1962).

York courts have tended to follow this rule and dismiss the complaint if special damage was not alleged.[18] The Court of Appeals, deciding the question six times[19] other than in *Hinsdale,* never dismissed a complaint. These six decisions, consistent with Prosser's formulation of the rule,[20] expand the *O'Connell* rule so that special damage is required only where the publication is innocent on its face and not within one of the classes of slander per se. *Hinsdale,* which cannot be reconciled with the suggested restatement rule, distinguishes *O'Connell* on the basis that it dealt with the improper use of an innuendo, and does not control cases which involve the pleading of extrinsic fact.[21] From this it would seem that the court is saying there never was a requirement that special damage be alleged, and that libel per quod cases are to be decided in line with the orthodox common law rule. Such a holding fails to consider the many contrary cases[22] in the lower New York courts. If the *Hinsdale* court intended to overrule these cases it should have so stated in clear terms.

Other language in the opinion indicates that the rule in the *O'Connell* case is not overruled but merely further expanded. The court cites two post *O'Connell* decisions[23] as applying "the reasonable, common-sense idea that a fact not expressed in the newspaper but presumably known to its readers is part of the libel."[24] This seems to indicate that the per quod rule now requires special damage

[18] See Everett v. Gross, 22 App. Div. 2d 257, 254 N.Y.S.2d 561 (1964); Kuhn v. Veloz, 252 App. Div. 515, 299 N.Y.S. 924 (1937); Macri v. Mayer, 22 Misc. 2d 429, 201 N.Y.S.2d 525 (Sup. Ct. 1960); Solotaire v. Cowles Magazines, Inc., 107 N.Y.S.2d 798 (Sup. Ct. 1951); Legion Against Vivisection v. Gray, 63 N.Y.S.2d 920 (Sup. Ct. 1946).

[19] Balabanoff v. Hearst Consol. Publications, Inc., 294 N.Y. 351, 62 N.E.2d 599 (1945); Henry v. New York Post, Inc., 280 N.Y. 842, 21 N.E.2d 887 (1939); Braun v. Armour & Co., 254 N.Y. 514, 173 N.E. 845 (1930); Ben-Oliel v. Press Publishing Co., 251 N.Y. 250, 167 N.E. 432 (1929); Sydney v. MacFadden Newspaper Publishing Corp., 242 N.Y. 208, 151 N.E. 209 (1926); Smith v. Smith, 236 N.Y. 581, 142 N.E. 292 (1923).

[20] Five of these cases involve imputations that come within one of the classes of slander per se and would not require special damages under the new restatement section. The sixth case can be viewed as being libelous on its face. See Henn, *"Libel-By-Extrinsic-Fact,"* 47 CORNELL L.Q. 14, 34 (1962).

[21] 17 N.Y.2d at —, 217 N.E.2d at 653-54, 270 N.Y.S.2d at 598.

[22] See cases cited note 14 *supra.*

[23] Balabanoff v. Hearst Consol. Publications, Inc., 294 N.Y. 351, 62 N.E.2d 599 (1945); Sydney v. MacFadden Newspaper Publishing Corp., 242 N.Y. 208, 151 N.E. 209 (1926).

[24] 17 N.Y.2d at —, 217 N.E.2d at 653, 270 N.Y.S.2d at 597.

only where the extrinsic facts are presumably unknown to the readership. The court stresses the fact that plaintiffs worked in the same office and lived in the same lightly populated area, thus underlining the probability that the readers readily understood the defamatory imputation.

One of the arguments in favor of the special damage rule is that the extrinsic facts will be known to relatively few people and, therefore, the publication is less likely to cause damage.[25] While this may be true in some cases it can easily be shown that in others the facts will be generally known throughout the community.[26] This weakness in the per quod rule could be eliminated by the "readership" test suggested in *Hinsdale.* Special damage would only be required where the extrinsic facts are not likely to be known to the public—where there is in actuality a much reduced possibility of harm. If the facts are likely to be known to the readership then they would be part of the libel and the case treated as actionable per se.

Another aspect of *Hinsdale,* although not considered by the court, is that the complaints alleged defendant knew or should have known the extrinsic facts and, hence, the defamatory imputation conveyed. At common law strict liability is imposed for defamation.[27] As one of the reasons for the special damage rule is to

[25] The extrinsic facts "may be expected to be known to relatively few people, and not to reach the general public with the newspaper." PROSSER, TORTS § 107, at 782 (3d ed. 1964).

[26] It is obvious that [the traditional common law] point of view is the one consistent with good sense since the harmful impact of a libel upon its victim is not less in the particular instance where its odious meaning requires resort to extrinsic facts which are known to the recipient of the libel.

Herrmann v. Newark Morning Ledger Co., 48 N.J. Super. 420, 444, 138 A.2d 61, 74 (1958).

[27] Liability for defamation does not depend on intention to defame the plaintiff, but on the fact of defamation. All that is required is that reasonable people would believe the publication defamatory of the plaintiff. See Washington Post v. Kennedy, 55 App. D.C. 162, 3 F.2d 207 (1924); Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 126 N.E. 260 (1920); Cassidy v. Daily Mirror, [1929] 2 K.B. 331; Jones v. Hulton & Co., [1909] 2 K.B. 444, *aff'd* [1910] A.C. 20; Morrison v. Ritchie & Co., 39 Scot L.R. 432 (1902); The classic statement is "whenever a man publishes he publishes at his peril." King v. Woodfall, Lofft 776, 781, 98 Eng. Rep. 914, 916 (K.B. 1774). Minimal fault is required in defamation. Defendant is not liable unless the communication of the defamatory matter to a third person was through intent or negligence. See Western Union Tel. Co. v. Lesesne, 198 F.2d 154 (4th Cir. 1952); Hedgpeth v. Coleman, 183 N.C. 309, 111 S.E. 517 (1922); Wilcox v. Moon, 64 Vt. 450, 24 Atl. 244 (1892); McNichol v. Grandy, [1931] Can. Sup. Ct. 696.

protect publishers from liability where the publication gives no indication of its defamatory nature and defendant knows of no facts which will make it so,[28] the injection of the fault concept would seem reasonable. Earlier cases[29] have held that where the publication was innocent on its face, defendant must be shown to have known or be negligent in not knowing the extrinsic facts before there can be any recovery. It would seem unreasonable to require plaintiff to prove special damage where the publication was defamatory through negligence or intent. It is suggested that plaintiff should be limited to special damage only where there is no fault and the publication is innocent on its face.

The per quod rule and the suggested alternatives are founded on the concept of special damage. The application of this concept in the area of defamation begs the ultimate question of what is the nature of the injury. The gravamen of the action is injury to the plaintiff's reputation.[30] Hence, the requirement of an allegation of pecuniary damage in order to recover for defamation seems anomalous. There is no logical reason for requiring special damage where a slanderous statement is not within one of the classes of slander per se. Such a rule should not be perpetuated by applying it to libel even in the limited area of libel per quod.[31] Furthermore, this

[28] The purpose of the rule requiring proof of special damages when the defamatory meaning does not appear on the face of the language used is to protect publishers who make statements innocent in themselves that are defamatory only because of extrinsic facts known to the reader. . . . In such a case, general damages for loss of reputation may be trivial, and the paper's mistake innocent, for the content of the report would not alert it to the possibility of defamation.

MacLeod v. Tribune Publishing Co., 52 Cal. 2d 536, 550, 343 P.2d 36, 43-44 (1959).

[29] Jones v. R.L. Polk & Co., 190 Ala. 243, 67 So. 577 (1915) (defendant must know or be negligent in not knowing the extrinsic facts); Caldwell v. Raymond, 2 Abb. Pr. 193 (N.Y. Sup. Ct. 1855) (plaintiff should have averred that defendant knew the extrinsic facts).

[30] See PROSSER, TORTS § 106 (3d ed. 1964); Green, *Relational Interests*, 31 ILL. L. REV. 35 (1936).

[31] In Hinkle v. Alexander, — Ore. —, 417 P.2d 586 (1966) the Oregon court considered the arguments on both sides of the proposed *Restatement* change and, in deciding against the change and overruling previous per quod decisions, concluded:

We are not so much concerned about which of the opposing rules has the actual support of a majority of the courts. Our prime concern is which rule is the better, more workable and less confusing. We conclude that the Restatement rule is to be preferred and adhere to it. . . . [I]mposing the restrictions of the law of slander on to that of libel has added consfusion to confusion and produces . . . absurd results. . . .

burden of proof gives excessive immunity to publishers[32] and destroys the vindicatory function of the action.[33] The per quod rule does not promote unity in the law of defamation but creates further disunity as the foundations for it in slander (the arbitrary class test) and in libel (the extrinsic fact test) rest on completely different concepts.

One possible solution would be to relax the requirements for showing special damage. The courts in Kansas[34] no longer insist upon a showing of specific pecuniary loss, and hold the requirement is met if there are allegations of some actual damage resulting from the defamation. Plaintiff, while not benefited by the presumption of general damage, is allowed to recover on a showing that he was in fact harmed.

Perhaps the best solution to the problem is a retraction statute similar to the English Defamation Act.[35] Under this act if the words are not defamatory on their face and the publisher is without fault, he is absolved of liability by a retraction. If the terms of

— Ore. at —, 417 P.2d at 589.
The concurring opinion in this case went on to say:

> The court . . . is fully warranted in its conclusion that the *per quod* rule is an erroneous introduction into the law of libel of a rule peculiar to slander, is illogical, and is more likely than not to lead to denials of justice.

— Ore. at —, 417 P.2d at 591.

[32] To require proof of pecuniary damages in such cases as a basis for a cause of action would be to emasculate the action without rational justification. It has well been stated of such a requirement: "There is no rhyme nor reason to this rule. Yet courts often resort to it, thus adding one more meaningless rule to the hopeless confusion of libel and slander law."
Herrmann v. Newark Morning Ledger Co., 48 N.J. Super, 420, 444, 138 A.2d 61, 74 (1958) citing Cowan, *Torts*, 9 RUTGERS L. REV. 157, 172 (1954).

[33] "The great function of an action of libel, to provide public vindication of the decent citizen's good name, is completely wiped out in a great number of cases by requiring such proof." Eldredge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733, 756 (1966).

[34] See Karrigan v. Valentine, 184 Kan. 783, 339 P.2d 52 (1959); Koerner v. Lawler, 180 Kan. 318, 304 P.2d 926 (1956).

[35] Defamation Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 66, § 4. The North Carolina retraction statute provides that where the article was published in good faith and there were reasonable grounds for belief that the statement was true, recovery is limited to actual damages. N.C. GEN. STAT. § 99-2 (1965). The court equated the term actual damages with the general damages presumed at common law. The effect of compliance therefore is merely to eliminate the possibility of punitive damages. See Lay v. Gazette Publishing Co., 209 N.C. 134, 183 S.E. 416 (1936); Pentuff v. Park, 194 N.C. 146, 138 S.E. 616 (1927); Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

the statute are not met the defendant's liability is the same as at common law, with general damage to reputation presumed. The practical result of this statute is similar to the result under the per quod rule, *i.e.*, it is only in the exceptional cases that money damages will be recovered. The major difference is that with the statute the plaintiff's name would be cleared and the vindicatory function of the action served.

REED JOHNSTON, JR.

Eminent Domain—Agriculture—Evidence—Just Compensation for Allotment Bearing Land

The Agricultural Adjustment Act of 1938 and its subsequent amendments provide a complex scheme for the regulation of the production of certain agricultural commodities.[1] Under the act, the Secretary of Agriculture determines what acreage requirements of each commodity will be required by the nation. This overall requirement is then apportioned by states, counties, and farms. Local committees at the county level apportion the allotment among the farms on which the commodity has been produced. The basis for the apportionment is the commodity production history of each farm, taking into consideration past production of the commodity, suitability of the land, available equipment for production, crop rotation practices, and other physical factors that affect the production of the commodity.[2]

It is through this generally outlined statutory scheme that a farm's eligibility and attainment of an acreage allotment for a specific commodity is determined.

The receipt of an allotment is noticeably self-perpetuating for the basis for award is heavily weighed on the commodity productive history and the suitability of the individual farm.[3] The allotment is made to the farm itself and not to the person who operates or owns the farm and, therefore, runs with the land.[4] The act does

[1] *E.g.*, Agricultural Adjustment Act of 1938 [hereinafter cited as Act of 1938], §§ 311-15, 52 Stat. 31 (1938), as amended, 7 U.S.C. §§ 1311-15 (1964), as amended, 7 U.S.C. §§ 1313(j)-14 (Supp. I, 1965). These commodities are: tobacco, cotton, corn, wheat, rice, and peanuts.

[2] *E.g.*, Act of 1938, § 313, added by 52 Stat. 47 (1938), as amended, 7 U.S.C. § 1313(b) (1964).

[3] *Ibid.*

[4] See Chandler v. Davis, 350 F.2d 669 (5th Cir. 1965), *cert. denied*, 382