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that involved in the *D'Anna* case presents the most workable approach to the problem for the benefit of all concerned.²⁷ Without the benefit of the statute and without access to some evidence of negligence the plaintiff faces the difficulty illustrated here.²⁸

North Carolina has not considered the problem directly, and has no explicit statutory provision.²⁹ If the case applying the doctrine of *res ipsa loquitur* where injuries were sustained by a guest is held not to be controlling,³⁰ the policy of the statutory provision as to dangerous flying may afford the plaintiff some evidence of negligence.³¹

WALTER LEE HORTON, JR.

Libel—Special Damages

The law of libel is an area of the law which at the present time is fraught with confusion in this jurisdiction.

Some of this confusion in North Carolina and elsewhere may be attributed to the fact that the common law distinguishes between that defamation which is oral and that which is written. Originally the common law courts took no jurisdiction over defamatory utterances, *i.e.*, spoken statements calculated to detract in a substantial way from the esteem in which a person is held in the community. The ecclesiastical courts took them under their jurisdiction, regarding them as sins, and dealt with them accordingly. As these spiritual courts began to lose

²⁷ Art. I-A Maryland Code § 9 (1951) as applied in *D'Anna v. United States*, 181 F. 2d 335 (4th Cir. 1950), provides that the owner of any aircraft damaging property or injuring persons in ascent, descent, or flight shall be prima facie liable in the absence of contributory negligence of the person involved or unless the aircraft is used without the consent, express or implied, of the owner. This statute provides the plaintiff a way to the jury as contrasted with the futility of the plaintiff's position in the *Williams* case. It does not burden the aircraft industry with absolute liability, but at the same time affords the plaintiff protection.

²⁸ These problems are set out and discussed fully in Simpson, *Use of Aircraft Accident Investigation Information in Actions for Damages*, 17 J. AIR L. 283 (1950). As to preparation for trial see Finley, *Trial Technique in Aircraft Accident Cases*, 31 TEXAS L. REV. 809 (1953), in which the author points out the overwhelming ignorance of most attorneys in the intricacies of obtaining, evaluating, and presenting evidence in aircraft litigation. As was indicated in *Williams v. United States*, 115 F. Supp. 386 (N. D. Fla. 1952), where military aircraft are involved recourse may be had to Congress for legislative relief. For some of the difficulties involved in obtaining Congressional relief where the judiciary offers none see Gellhorn and Lauer, *Congressional Settlement of Tort Claims against the United States*, 55 COL. L. REV. 1 (1955).

²⁹ Section 5 of the Uniform Aviation Act was adopted by North Carolina in 1927, as N. C. GEN. STAT. § 63-14 (1943). It was repealed in 1947 by c. 1069, § 3 of Session Laws of 1947. This statute is identical with that involved in the *Praylou* and *Prentiss* cases cited in footnote 17 *supra*. This statute imposed strict liability under precisely the same conditions as the Maryland statute set out in footnote 27 *supra* raises a prima facie presumption.

³⁰ *Smith v. Whitley*, 223 N. C. 534, 27 S. E. 2d 442 (1943). See Note, 28 N. C. L. REV. 432 (1950).

³¹ N. C. GEN. STAT. § 63-18 (1953) makes it a misdemeanor to drop any object from an aircraft other than water or loose sand.

their power, tort actions for slander began to creep into the common law courts. Thus arose a conflict over jurisdiction, which led the common law courts to hold that oral defamation was a spiritual matter to be dealt with by the spiritual court unless "temporal" damages could be proved.¹ However, as the common law courts strengthened their position, they assumed jurisdiction over three classes of oral defamation declaring that these were of such serious character that malice and temporal damages would be conclusively presumed. These three favored classes were oral charges (1) imputing the commission of a crime, (2) imputing a loathsome disease, or (3) tending to prejudice one in his trade, profession, or calling.² Modern statutes have added a fourth class to this group.³

It was not until much later, after the introduction of printing, that a separate set of rules was worked out for written and printed defamation by the Court of Star Chamber. With the abolition of the Star Chamber, jurisdiction over written and printed defamation passed to the common law courts. All written or printed statements tending to injure one's reputation and expose him to hatred, contempt, or ridicule were considered defamatory and actionable without the necessity of proving special damages. Perhaps there are three reasons why proof of special damages was not required in cases of written defamation: (1) originally, written defamation was a crime as well as a tort, (2) it was considered much more serious to put down deliberately on paper a lasting memorial of a lie against a person's good reputation, and (3) there was no jurisdictional conflict over these actions.⁴

Therefore, at common law oral defamations were divided into two groups—those which came within the favored classes, and all others. The former were called slander *per se*, *i.e.*, actionable without proof of special damages. The latter were called slander *per quod*, *i.e.*, actionable only with allegation and proof of special damages. Within the favored classes, constituting slander *per se*, it made no difference whether the spoken words were slanderous on their face or whether resort to extrinsic evidence was necessary to show that the oral statements were slanderous. On the other hand, libelous statements were not separated into classes. Any written or printed statements that were defamatory were actionable without proof of special damage. Thus it is obvious that the phrase "slander *per se*" merely had reference to the three favored classes which were actionable in themselves, and that it did not mean slander "on its face" as one might use the term "per se" today. As libel was not divided into classes which required proof of special damages and classes

¹ PROSSER, TORTS 793-799 (1941); McCORMICK, DAMAGES 415-419 (1935); Note, 14 CALIF. L. REV. 61 (1925).

² PROSSER, TORTS 793-799 (1941); McCORMICK, DAMAGES 415-419 (1935).

³ N. C. GEN. STAT. § 99-4 (1953). (Dealing with charges of incontinency against an innocent woman).

⁴ *Supra*, note 2.

which did not, there was no place in the law for such a corresponding phrase as "libel per se." Any libelous statement was actionable in itself. However—and herein lies the root of the confusion today—the courts did begin to use the phrase "libel per se," but they used it simply to distinguish between written or printed statements which were clearly libelous on their face and those in which resort to extrinsic evidence was necessary in order to reveal their defamatory meanings. Their use of the phrase carried no implication with respect to special damages.⁵

The courts of the United States accepted the common law rule that any libel was actionable without the necessity of pleading and proving special damages, and in the minority of the American jurisdictions this is the rule today, not only as to written or printed publications which are defamatory upon their face, but also as to those which require extrinsic evidence to establish their defamatory meaning.⁶ However, a greater number of courts hold that where extrinsic evidence is necessary to establish the defamatory meaning, libel is not actionable without proof of special damages, *i.e.*, if the words are not libelous "per se" (on their face), they are not actionable without proof of special damages.⁷ This majority rule clearly is the product of confusion. It differs from the corresponding rule of slander in only one respect—the difference between the meaning of "slander per se" and libel "per se." The courts have tripped over their own ambiguous device, confused the dual use of "per se," and, in their confusion, imported the concept of special damages from the field of slander into the field of libel. An illustration will point out the difference in the two views. If the written or printed publication stated that X was a Negro, when in fact X was a white man, the minority would and do hold that the publication is libelous and actionable without proof of special damages even though the publication is not

⁵ PROSSER, TORTS 793-799 (1941); POLLOCK, TORTS 238-239 (12th ed. 1923); MCCORMICK, DAMAGES 415-419 (1935); NEWELL, SLANDER AND LIBEL §§ 5, 6, 20, 21 (4th ed. 1924); Note, 14 CALIF. L. REV. 61 (1925); Note, MICH. L. REV. 253 (1939).

⁶ SMITH AND PROSSER, CASES ON TORTS 1022 (1952); Merchants' Ins. Co. v. Buckner, 98 Fed. 222 (6th Cir. 1899); Ervin v. Record Pub. Co., 154 Cal. 79, 97 P. 21 (1908); Hughes v. Samuels Bros., 179 Iowa 1077, 159 N. W. 589 (1916); Courier Journal Co. v. Noble, 251 Ky. 527, 65 S. W. 2d 703 (1933); Sydney v. MacFadden Newspaper Pub. Corp., 242 N. Y. 208, 151 N. E. 209 (1926); Marr v. Putnam, 196 Ore. 1, 246 P. 2d 509 (1952); Reiman v. Pacific Development Soc., 132 Ore. 82, 284 P. 575 (1930).

⁷ SMITH AND PROSSER, CASES ON TORTS 1025 (1952); Rose v. Indianapolis Newspapers, 213 F. 2d 227 (7th Cir. 1954); Landstrom v. Thorpe, 189 F. 2d 46 (8th Cir. 1951); Ilitzky v. Goodman, 57 Ariz. 216, 112 P. 2d 860 (1941); Shaw Cleaners and Dyers, Inc., v. Des Moines Dress Club, 215 Iowa 1130, 245 N. W. 231 (1932); Jerald v. Houston, 124 Kan. 657, 261 P. 851 (1927); Del Rico Co. v. New Mexican, Inc., 56 N. M. 538, 246 P. 2d 206 (1953); Wiley v. Oklahoma Press Pub. Co., 106 Okla. 52, 233 P. 224 (1924); Lana v. Seattle Times Co., 186 Wash. 618, 59 P. 2d 753 (1936). Also see dissent in Sydney v. MacFadden Newspaper Pub. Corp., 242 N. Y. 208, 151 N. E. 209 (1926).

libelous on its face, or libel "per se."⁸ On the other hand, the majority would hold that as the publication is not libelous on its face and as the defamatory meaning is not shown until the plaintiff proves that he is a white man, the publication is not actionable without proof of special damages.⁹

It is impossible to determine accurately North Carolina's position on the question prior to 1937. Oddly enough, only one case, *Harrison v. Garrett*, arose in this state prior to that year in which the issue was directly raised.¹⁰ Perhaps this is due to the fact that the definition of libel is so broad that practically all defamatory publications prompting suits are libelous on their face. In that case the defendant did not raise the question until on appeal. Instead of deciding the point, the court said, "The defect alleged in this case is that the matter contained in the letter is not libelous per se and that the plaintiff does not allege special damages. If the words of the letter are not libelous per se and could only become actionable if special damages be alleged, the complaint, if there has been a failure to allege special damages, would only be a defective statement of a cause of action as distinguished from the statement of a defective cause of action, and the defect was waived or cured when the defendant answered the complaint."¹¹ Another opportunity to decide the issue did not present itself until 34 years later.¹² In the cases in which the question was not directly presented during the intervening period, the court repeatedly used the phrase "libel per se,"¹³ but since the point was not directly in issue in these cases, the court apparently did not think it necessary to render any definitive decision. As a result the question lay in doubt for years, the assumption being that the common law rules would apply.¹⁴

In 1937 the controversial *Flake* case¹⁵ was decided. Speaking as if

⁸ *Upton v. Times-Democrat Pub. Co.*, 104 La. 141, 28 So. 970 (1900); *Flood v. News and Courier Co.*, 71 S. C. 112, 50 S. E. 637 (1905).

⁹ *Iltzky v. Goodman*, 57 Ariz. 216, 112 P. 2d 860 (1941). However, if this statement were spoken instead of written, all jurisdictions would hold that as it is not within one of the favored classes of slander per se, the statement is not actionable without proof of special damages. PROSSER, *TORTS* 798-807 (1941); MCCORMICK, *DAMAGES* 415-419 (1935); *Deese v. Collins*, 191 N. C. 749, 133 S. E. 92 (1926).

¹⁰ 132 N. C. 172, 43 S. E. 594 (1903).

¹¹ *Id.* at 177, 43 S. E. at 596.

¹² *Flake v. Greensboro News Co.*, 212 N. C. 780, 195 S. E. 55 (1937).

¹³ *Davis v. Askin's Retail Stores*, 211 N. C. 551, 191 S. E. 33 (1937); *Harrel v. Goerch*, 209 N. C. 741, 184 S. E. 489 (1936); *Oates v. Wachovia Bank and Trust Co.*, 205 N. C. 14, 169 S. E. 869 (1933); *Pentuff v. Park*, 194 N. C. 146, 138 S. E. 616 (1927); *Hedgepeth v. Coleman*, 183 N. C. 309, 111 S. E. 517 (1922); *Hall v. Hall*, 179 N. C. 571, 103 S. E. 136 (1920); *Brown v. Elm City Lumber Co.*, 167 N. C. 9, 82 S. E. 961 (1914).

¹⁴ *Wettach, Recent Developments in Newspaper Libel*, 7 N. C. L. REV. 3 (1928); *Brandis and Trotter, Some Observations on Pleading Damages in North Carolina*, 31 N. C. L. REV. 249, 269 (1953).

¹⁵ *Flake v. Greensboro News Co.*, 212 N. C. 780, 195 S. E. 55 (1937).

it had been the law in this state from time immemorial, the court said, "In publications which are libelous per quod the innuendo and special damages must be alleged and proved."¹⁶ Here, for the first time in North Carolina, the court directly stated that special damages must be alleged and proved if a publication is not libelous "per se" (on its face). This case divides libel into three classes: (1) publications which are obviously defamatory and which are termed libel per se; (2) publications which are susceptible of two reasonable interpretations, one of which is defamatory and the other is not; and (3) publications which are not defamatory without the aid of explanatory circumstances and which are called libel per quod. If the publication constitutes libel per se, special damages need not be alleged and proved, but if it constitutes libel per quod, they must be. The status of the second class is left somewhat in doubt. Prior to this case it was held that if the publication were susceptible of two interpretations, one defamatory and the other not, the jury should decide the meaning understood, and the court said nothing about special damages.¹⁷ The *Flake* case seems to indicate that special damages need not be alleged if the complaint alleges that the defamatory meaning was intended and understood.¹⁸

The only North Carolina authority relied on for holding the special damages must be alleged and proved in publications which are libelous per quod was *Oates v. Wachovia Bank and Trust Co.*,¹⁹ a slander case concerned with the question of whether the charge came within one of the four classes of slander per se. Not only is this a slander case, but the court also clearly indicated that extrinsic evidence could be used to bring the charge within one of the classes of slander per se, eliminating the necessity of proving special damages. As a slander case, it would seem not to be controlling in a libel decision. Additionally it would seem that its use in the *Flake* case as supporting authority for the proposition that in libel special damages must be alleged and proved where extrinsic evidence is necessary, was a result of a misinterpretation of the decision.²⁰ It is also worthy of note that the *Flake* case cites the same outside authority for its distinction between libel per se and per quod that the *Oates* case cites for its distinction between slander per se and per quod. That authority is a slander case also.²¹

So it is seen that the North Carolina court has lost sight of the dis-

¹⁶ *Id.* at 785, 195 S. E. at 58.

¹⁷ *Oates v. Wachovia Bank and Trust Co.*, 205 N. C. 14, 169 S. E. 869 (1933); *Castelloe v. Phelps*, 198 N. C. 454, 152 S. E. 163 (1930).

¹⁸ Brandis and Trotter, *Some Observations on Pleading Damages in North Carolina*, 31 N. C. L. Rev. 249, 269 (1953).

¹⁹ 205 N. C. 14, 169 S. E. 869 (1933).

²⁰ Brandis and Trotter, *Some Observations on Pleading Damages in North Carolina*, 31 N. C. L. Rev. 249, 269 (1953).

²¹ *Walker v. Tucker*, 220 Ky. 362, 295 S. W. 138 (1927).

inction between "slander per se" (charges within the four classes actionable in themselves without proof of special damages) and libel "per se" (on its face) and has brought the special damage concept over from the field of slander into the field of libel. Instead of the original rule that the existence of damages is conclusively presumed from the publication of the libel, North Carolina now divides libel into two broad classes. As to the first, libel per se, the original rule is still applied; but as to the second, libel per quod, the existence of damages is no longer presumed, but proof thereof is required. Why? Because long ago a judge used the phrase "libel per se" simply to indicate that the publication was libelous without need of extrinsic evidence. Had he simply said "this publication is not actionable without extrinsic evidence to show its defamatory meaning," perhaps the confusion would never have arisen. In 1928 it was pointed out in this *Law Review* that the confusion existed in other states.²² It is difficult to determine whether the court in the *Flake* case was merely confused, whether it deliberately adopted what it considered the best view, or both.

Since the *Flake* case, there has been only one North Carolina decision having any implications as to this problem.²³ This case arose on demurrer to test the sufficiency of a complaint, and, while not decisive of the issue, it seems that the court clearly recognized that publication of any libel is actionable in itself—irrespective of whether any special damage has been caused to plaintiff's reputation or otherwise. At least it cites authority to that effect. On the other hand, it is a sound presumption that the court was aware of the *Flake* case; especially since it cites it for its broad definition of libel "per se."

Thus it appears that the law in North Carolina as regards libel remains confused. It seems that the clarity expressed in the *Flake* case was short lived. Of course, it remains to be seen whether the court, in subsequent decisions, will follow the majority rule clearly set out in the *Flake* case, or adopt the minority rule as indicated by the court in the *Kindley* case.

Prior to the *Flake* case, the court had consistently allowed extrinsic evidence to show that spoken charges were within one of the four categories of slander per se without requiring allegation and proof of special damages, although on their face they were not within any of them.²⁴ As to whether the court will require allegation and proof of special damages in such cases today by analogy to the rule laid down in the *Flake* case,

²² Wettach, *Recent Developments in Newspaper Libel*, 7 N. C. L. REV. 3 (1928).

²³ *Kindley v. Privette*, 241 N. C. 140, 84 S. E. 2d 660 (1954).

²⁴ See for example: *Oates v. Wachovia Bank and Trust Co.*, 205 N. C. 14, 169 S. E. 869 (1933); *Hurley v. Lovett*, 199 N. C. 793, 155 S. E. 875 (1930); *Castelloe v. Phelps*, 198 N. C. 454, 152 S. E. 163 (1930); *Simmons v. Morse*, 51 N. C. 6 (1858); *Watts v. Greenlee*, 13 N. C. 115 (1829).

quaere. A case closely following the *Flake* case implies that it would not be necessary.²⁵

On the surface the majority rule may seem to be a good one. However, if a departure from the common law is deemed desirable, instead of bringing the special damage concept over from slander into libel, it would seem far better to abolish the special damage concept altogether in the field of defamation. There was no legal reason nor logic for the original common law rule that in all cases of slander special damages had to be alleged and proved. There was even less reason for making exceptions as to the three narrow categories of slander per se. All defamation should either be actionable or not actionable. When proof of special damages is required where extrinsic evidence is necessary to show the defamatory meaning, the court is, in effect, holding that the defamatory meaning was understood only by those who understood the innuendo and knew the circumstances, and that this is not sufficient to make it actionable unless the plaintiff has suffered pecuniary damages because of it. Yet it is among those who understood the defamatory meaning that plaintiff's reputation has been damaged—and it is for damages to reputation that an action for defamation lies.

ALEXANDER H. BARNES.

Conflict of Laws—Residence or Domicile—Non-Resident Motorist Statutes

In a recent decision¹ the defendant was served with summons under the North Carolina Non-Resident Motorist Statute.² He moved to set aside the service of process as invalid on the ground that at the time of the accident he was a resident of North Carolina.³

It appeared from the facts that some time prior to November, 1952, the defendant was assigned to active duty in the armed services at Camp Lejeune, near Jacksonville, North Carolina. The accident occurred in January 1954, and nine days later the defendant was transferred to

²⁵ *Scott v. Harrison*, 215 N. C. 427, 2 S. E. 2d 1 (1939).

¹ *Hart v. Queen City Coach Co.*, 241 N. C. 389, 85 S. E. 2d 319 (1955).

² N. C. GEN. STAT. § 1-105 (1953). All forty-eight states and the District of Columbia have now enacted non-resident motorist statutes. For a complete list of citations as of 1947 see, *Knoop v. Anderson*, 71 F. Supp. 832 (W. D. Iowa 1947).

³ Unless otherwise provided, it is the residence of the defendant at the time of the accident which controls in the application of statutes authorizing constructive service on non-resident motorists. *Rompza v. Rucas*, 337 Ill. App. 106, 85 N. E. 2d 467 (1949) (One of the basic jurisdictional facts is the non-residence of the defendant at the time of the accident.); *Netter v. King*, 331 Ill. App. 619, 73 N. E. 2d 798 (1947); *Welsh v. Ruopp*, 228 Iowa 70, 289 N. W. 760 (1940) (Non-residence at the time of the accident cannot be assumed.); *Bigham v. Foor*, 201 N. C. 14, 158 S. E. 548 (1931). *Contra*: *Hendershot v. Ferkel*, 144 Ohio St. 112, 56 N. E. 2d 205 (1944) (Act applies to residents who subsequently became non-residents or who conceal their whereabouts.)