Washington and Lee Law Review

Volume 24 | Issue 1 Article 15

Spring 3-1-1967

Special Damages Requirement for Libel Per Quod

where a tract of land was left to a city for a park for white persons only, the fourteenth amendment was enforced despite an attempt by the city government to circumvent it by appointing private trustees to manage it.[32]

By ruling the electorate to be an agent of the state, the California court clearly brought *Mulkey* within the scope of the fourteenth amendment affirmative state action doctrine. By doing so, however, the court placed its ruling on very tenuous grounds, for it is difficult indeed, to find the barest elements of a traditional agency relationship between the state and the electorate. Certainly the state could not have exercised any of the principal's traditional prerogatives over its agent. This is not to say, however, that absent the state-electorate agency fiction, *Mulkey* would have been decided otherwise. The state involvement doctrine is sufficient to extend the fourteenth amendment to the fact situation in *Mulkey*. Any state electoral process has a large amount of state involvement. The state prints the ballots, provides the polling places, and certifies the results. If the result of such an electoral process is discriminatory, as was the case in *Mulkey*, then the process, with the state involvement, would be unconstitutional. Analysis of the problem on the basis of state involvement, rather than state action, would have been the more logical approach.

STAFFORD W. KEEGIN

SPECIAL DAMAGES REQUIREMENT FOR LIBEL PER QUOD

The two principal categories of libel, or written defamation, are libel per se and libel per quod. Libel per se is any publication defamatory on its face; libel per quod is a publication defamatory only in light of extrinsic facts.[1] The common law rule of libel was that any publication proven libelous, even if by extrinsic facts, was actionable without proof of special damages.[2] In the late nineteenth century courts began to adopt the view that special, or pecuniary, damages must be proved to recover for libel per quod while libel per se remained actionable without any such proof.[3] The requirement of special

tremely similar fact situations between *In re Girard* and Evans v. Newton, 382 U.S. 296 (1966), there is a distinguishing fact in that the park in *Evans* is manifestly a public facility and Girard College is not.

[32]Evans v. Newton, 382 U.S. 296 (1966).

[1]BLACK, LAW DICTIONARY (4th ed. 1951); Thompson v. Upton, 218 Md. 433, 146 A.2d 880, 883-84 (1958).

[2]Thorley v. Kerry, 4 Taunt. 355, 128 Eng. Rep. 367 (K.B. 1812).

[3]See, *e.g.*, Walker v. Tribune Co., 29 Fed. 827 (C.C.N.D. Ill. 1887); Tonini v. Cevasco, 114 Cal. 266, 46 Pac. 103 (1896); Fry v. McCord, 95 Tenn. 678, 33 S.W.

damages in libel per quod, though, has never been fully accepted by the courts, and as a result the case law in the area remains confused.[4] The prevailing law is that libel per quod requires proof of special damages unless the extrinsic facts proved place the defamation in one of the four categories which constitute slander per se.[5] The early rule of slander was that it was not actionable unless actual damage was proved.[6] The courts soon began to recognize certain exceptions to this rule and allowed recovery without special damages for slander falling into one of four categories known as slander per se. These four categories are imputations of: (1) crime;[7] (2) loathsome disease;[8] (3) conduct or characteristics tending to hurt or prejudice the plaintiff's reputation thus affecting his business, profession, or trade;[9] and (4) unchastity of a woman.[10] All other slander requires special damage for recovery. The prevailing law in the area of libel per quod is to treat the libel per quod exactly as slander. Therefore, unless the extrinsic facts place the defamation in one of the four slander per se areas special damages are needed for recovery.

The *Restatement of Torts*[11] adheres to the common law rule that all libel, either per se or per quod, is actionable without proof of special damages. A few cases apparently follow the *Restatement* rule but only

---

568 (1895). The uniqueness of these decisions is attested to by Carpenter, *Libel Per Se in California and Some Other States*, 17 So. CAL. L. REV. 347 (1944).

[4]*Developments in the Law—Defamation*, 69 HARV. L. REV. 875, 890 (1956).

[5]Ilitzky v. Goodman, 57 Ariz. 216, 112 P.2d 860 (1941); McBride v. Crowell-Collier Publishing Co., 196 F.2d 187 (5th Cir. 1952); Karrigan v. Valentine, 184 Kan. 783, 339 P.2d 52 (1959); Axton Fisher Tobacco Co. v. Evening Post Co., 169 Ky. 64, 183 S.W. 269 (1916); Campbell v. Post Publishing Co., 94 Mont. 12, 20 P.2d 1063 (1933); Chase v. New Mexico Publishing Co., 53 N.M. 145, 203 P.2d 594 (1949); Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938); Ellsworth v. Martindale-Hubbell Law Directory, Inc., 66 N.D. 578, 268 N.W. 400 (1936); Moore v. P. W. Publishing Co., 3 Ohio St. 2d 183, 209 N.E.2d 412 (1965), *cert. denied*, 382 U.S. 367 (1966); Hargrove v. Oklahoma Press Publishing Co., 130 Okla. 76, 265 Pac. 635 (1928); Fry v. McCord, 95 Tenn. 678, 33 S.W. 568 (1895).

Several jurisdictions have not yet dealt directly with the problem, but there are dicta in the following jurisdictions to the effect that publication proved defamatory by extrinsic facts requires special damages: Myers v. Mobile Press-Register, Inc., 266 Ala. 508, 97 So. 2d 819 (1957); Langworthy v. Pulitizer Publishing Co., 368 S.W.2d 385 (Mo. 1963); Malouf v. Metropolitan Life Ins. Co., 75 Utah 175, 283 Pac. 1065 (1929).

[6]PROSSER, TORTS § 107 at 772 (3d ed. 1964).

[7]Reitan v. Goebel, 33 Minn. 151, 22 N.W. 291 (1885).

[8]Carslake v. Mapledoram, 2 Term R. 473, 100 Eng. Rep. 255 (K.B. 1788).

[9]Fowles v. Bowen, 30 N.Y. 20 (1864) (business); Secor v. Harris, 18 Barb. 425 (N.Y. Sup. Ct. 1854) (profession).

[10]Cushing v. Hederman, 117 Iowa 637, 91 N.W. 940 (1902).

[11]RESTATEMENT, TORTS § 569 (1938).

in dicta, and these cases involve either libel per se or libel per quod within one of the four slander per se categories.[12]

Hinsdale v. Orange County Publications, Inc.,[13] a decision of the Court of Appeals of New York, is a recent case involving the question of whether proof of special damages is necessary to recover for libel per quod. The defendant newspaper published a notice of engagement between the plaintiffs, stating that Robert W. Hinsdale would marry Miss Concetta Kay Rieber. Plaintiffs alleged the extrinsic facts that both were already married and living with their respective spouses and children. Thus, the publication, if libelous at all, falls within the libel per quod category. No special damages were alleged or proved by the parties, therefore the trial court dismissed the complaint, and the appellate division affirmed.[14] The Court of Appeals reversed, opening the way to recovery without special damages.[15] While the publication of a false engagement notice involving two single people may not be libelous, the publication of such a notice involving persons already married to other parties is libelous. All of the cases relied upon in *Hinsdale* allowing recovery without proof of special damages involved either libel per se[16] or libel per quod in one of the four slander categories.[17] The court specifically refuted any argument that *Hinsdale* falls within the slander per se area in that the publication impugns the chastity of Mrs. Rieber by stating that the publication "does not necessarily charge sexual immorality. . . ." [18]

The only other case decided by the New York Court of Appeals in which the publication was libel per quod within one of the four slander per se categories and in which recovery was allowed was

[12]Herrmann v. Newark Morning Ledger Co., 48 N.J. Super. 420, 138 A.2d 61 (App. Div. 1958); Pitts v. Spokane Chronicle Co., 63 Wash. 2d 763, 388 P.2d 976 (1964); Martin v. Outboard Marine Corp., 15 Wis. 2d 452, 113 N.W.2d 135 (1962).

[13]17 N.Y.2d 284, 217 N.E.2d 650, 270 N.Y.S.2d 592 (1966).

[14]Hinsdale v. Orange County Publications, Inc., 24 App. Div. 2d 705, 261 N.Y.S.2d 1005 (1966).

[15]17 N.Y.2d 284, 217 N.E.2d 650, 270 N.Y.S.2d 592 (1966).

[16]Conroy v. Breland, 185 Miss. 787, 189 So. 814 (1939); Spector v. News Syndicate Co., 280 N.Y. 346, 21 N.E.2d 185 (1939).

[17]Balabanoff v. Hearst Consol. Publishers, 294 N.Y. 351, 62 N.E.2d 599 (1945); Henry v. New York Post, 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); Smith v. Smith, 236 N.Y. 581, 142 N.E. 292 (1923); Blake v. Sun Printing & Publishing Ass'n, 229 N.Y. 515, 129 N.E. 897 (1920); Morey v. Morning Journal Ass'n, 123 N.Y. 207, 25 N.E. 161 (1890); Murphy v. Harty, 238 Ore. 228, 393 P.2d 206 (1964); Pitts v. Spokane Chronicle Co., 63 Wash. 2d 763, 388 P.2d 976 (1964) (there is however, dicta to the effect that the court would allow recovery in any libel by extrinsic fact case).

[18]217 N.E.2d at 651, 270 N.Y.S.2d at 595.

Sydney v. McFadden Newspaper Publishing Corp.[19] *Sydney*, presenting a fact situation nearly identical to that in *Hinsdale*, involved a newspaper announcement which stated that Miss Doris Keane was Fatty Arbuckle's lady love and hinted at a possible future marriage. But "Miss Keane" proved the extrinsic fact of her marriage to Basil Sydney and the court allowed recovery without proof of special damages.[20] The Court of Appeals has generally adhered to the common law rule of not requiring special damages,[21] but only *Sydney* and *Hinsdale* are contrary to the prevailing law in the libel per quod area.[22]

There is some confusion in New York[23] because the lower courts follow the prevailing law in the libel per quod category.[24] The reason for this situation in the lower New York courts is the misinterpretation of the holding in *O'Connell v. Press Publishing Co.*[25]

In *O'Connell* the defendant newspaper published an article concerning criminal prosecutions of certain sugar company officials for cheating their customers by use of crooked weighing machines. The publication indicated that another company official was also to be prosecuted. The article, in identifying the witness O'Connell as an official of the company, stated that he was the inventor of a steel spring essential to the machines. Plaintiff alleged that the statements indicated that he was engaged in criminal conduct. However, the court denied recovery, holding simply that the publication did not support the alleged innuendo of criminality.[26] While *O'Connell* actually denied recovery because the publication was not defamatory, the

---

[19]242 N.Y. 208, 151 N.E. 209 (1926).

[20]Libel *by extrinsic fact involves the inducement.* The only necessity in this instance is to prove the extrinsic fact which thus renders the writing *as stated* defamatory.

[21]See Harwood Pharmacal Co. v. NBC, 9 N.Y.2d 460, 174 N.E.2d 602, 214 N.Y.S.2d 725 (1961). Ben-Oliel v. Press Publishing Co., 251 N.Y. 250, 167 N.E. 432 (1929); Blake v. Sun Printing & Publishing Ass'n, 229 N.Y. 515, 129 N.E. 897 (1920); Morey v. Morning Journal Ass'n, 123 N.Y. 207, 25 N.E. 161 (1890). *Harwood* is particularly important because it cites *O'Connell* and still follows *Sydney*.

[22]*Supra* note 5.

[23]Note, 27 FORDHAM L. REV. 405 (1958).

[24]See Everett v. Gross, 22 App. Div. 2d 257, 254 N.Y.S.2d 561 (1964); 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, Inc. v. Grey, 63 N.Y.S.2d 920 (Sup. Ct. 1946).

[25]214 N.Y. 352, 108 N.E. 556 (1915).

[26]Libel by innuendo, whether with or without extrinsic fact, involves a publication in which the statement is susceptible of a defamatory meaning. The plaintiff is usually asserting that an interpretation of the words as they stand is defamatory. O'Connell v. Press Publishing Co., *supra* note 25.

lower New York courts have interpreted it as standing for the proposition that special damages are necessary to recover in a libel per quod action.[27]

Hinsdale could be viewed as adhering to the common law rule, approved by the *Restatement of Torts*, that all libel, per se or per quod, is actionable without proof of special damages. It is also possible that *Hinsdale* is not opposed to the prevailing law in the area of libel per quod but has merely created a fifth category of libel per quod not requiring special damages. This category encompasses marital intentions and marital status. While there is no precedent for it in the slander area, written publications concerning marital status which have a tendency to bring the parties into public disgrace, scorn, ridicule, and contempt have been held actionable without proof of special damage.[28] *Gersten v. Newark Morning Ledger*[29] held that any false publication of marital discord is defamatory on its face and actionable without proof of special damages.[30] Numerous other cases protect existing marital status from any publication placing it in a bad light.[31]

In addition to the protection of existing marital status, two cases, *Kirman v. Sun Printing & Publishing Ass'n*[32] and *Orband v. Kalamazoo Tel. Co.*,[33] support the view that false imputations of matrimonial intentions in a publication are actionable without proof of special damages. *Orband* involved a newspaper publication which attributed to Miss Orband a statement denying her engagement to Peter Mulder. In addition Miss Orband denied that any rumor of the engagement ever existed and that the newspaper article denouncing the engagement was unnecessary. Moreover, the statements attributed to her were misquoted. It was common knowledge according to Miss Orband

[27]*Supra* note 24.

[28]Republican Publishing Co. v. Mosman, 15 Colo. 399, 24 Pac. 1051 (1890) (defamatory on its face); Horton v. Binghamton Press Co., 122 App. Div. 332, 106 N.Y. Supp. 875 (1907) (defamatory on its face); Woolworth v. Star Co., 97 App. Div. 525, 90 N.Y. Supp. 147 (1904) (defamatory on its face); Bradley v. Cramer, 59 Wis. 309, 18 N.W. 268 (1884) (defamatory on its face).

[29]52 N.J. Super. 152, 145 A.2d 56 (1958) (The publication is defamatory on its face).

[30]145 A.2d at 59.

[31]See, *e.g.*, Taylor v. Tribune Publishing Co., 67 Fla. 361, 65 So. 3 (1914) (slander per se category); Smith v. Smith, 73 Mich. 445, 41 N.W. 499 (1889) (slander per se category); De Festetics v. Sun Printing & Publishing Ass'n, 57 Misc. 194, 109 N.Y. Supp. 30 (Sup. Ct. 1907) (slander per se category); Stokes v. Morning Journal Ass'n, 72 App. Div. 184, 76 N.Y. Supp. 429 (1902) (slander per se category).

[32]99 App. Div. 367, 91 N.Y. Supp. 193 (1904) (defamatory on its face).

[33]170 Mich. 387, 136 N.W. 380 (1912).

that Mulder was an uncouth degenerate notorious for his convictions of public drunkenness. The court held the publication to be libelous and allowed recovery without proof of special damages.[34] *Kirman* involved a newspaper article stating, among other things, that the plaintiff went to a hall to be married, guests attended, and the bridegroom failed to appear. Plaintiff proved that she was never engaged, that no such events ever occurred, and that the story tended to subject her to public ridicule. *Kirman* allowed recovery without the necessity of proving special damages.[35]

Three cases relied upon by *Hinsdale* allowed recovery without proof of special damages. In *Morey v. Morning Journal Ass'n*,[36] Morey alleged that he was defamed as a result of a newspaper article which stated that he was threatened with suit for breach of a promise to marry. Morey proved he was a married man and introduced evidence concerning the nature of his business and the effect the publication had on it. It is unclear whether the court based its decision on the damage to his business or on the fact that he was married. In *Henry v. New York Post, Inc.*,[37] Louise Henry, a motion picture actress, was defamed by an article concerning the status of her marriage and the reasons for a divorce suit. She alleged that although the publication referred to a different person, due to peculiar circumstances she was defamed in her profession. *Smith v. Smith*[38] involved a sworn application for a marriage license filed by the defendant which stated that he was never married. The plaintiff, his divorced wife, claimed that she was defamed since this was a public record and that the details were published in various newspapers. The fact that *Hinsdale* relies on these cases further supports the interpretation that *Hinsdale* has established a fifth category which allows recovery for libel per quod without proof of special damages.[39]

In all of the previous cases mentioned in connection with this fifth category, the publication was, however, either defamatory on its face,[40] or the extrinsic facts placed the defamation in one of the already established four slander per se categories.[41] Thus, it may be that the interpretation of *Hinsdale* as establishing a fifth category is weakened by this factor.

---

[34]136 N.W. at 382.
[35]Kirman v. Sun Printing & Publishing Ass'n, *supra* note 32.
[36]123 N.Y. 207, 25 N.E. 161 (1890) (slander per se category).
[37]280 N.Y. 842, 21 N.E.2d 887 (1939) (slander per se category).
[38]236 N.Y. 581, 142 N.E. 292 (1923) (slander per se category).
[39]217 N.E.2d at 653, 270 N.Y.S.2d at 595.
[40]*Supra* notes 28, 29, 32, and 33.
[41]*Supra* notes 31, 36, 37, and 38.