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Variation on Libel Per Quod

Laurence H. Eldredge*

During the nineteenth century it became settled common law in England and in the United States that in any action for libel, as distinct from slander, the plaintiff could recover damages without pleading or proving that he had in fact suffered any damages as a result of the publication. The American Law Institute accepted this as sound law. Volume III of the *Restatement of Torts*, published in 1938, stated the rule in section 569: "One who falsely, and without a privilege to do so, publishes matter 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."

In 1941, in the first edition of his excellent treatise on the law of torts, Dean Prosser stated: "This is the accepted rule in England, and in the great majority of the American jurisdictions, not only as to publications which are defamatory upon their face, but also as to those which require resort to extrinsic facts by way of 'inducement' to establish the defamatory meaning."¹

Some states, however, had adopted the spurious rule of "libel per quod," which states that when the written statement is innocent on its face and only becomes defamatory in the light of extrinsic facts, the defendant is not subject to liability unless the plaintiff pleads and proves special damages.² Without considering the soundness of the "libel per quod" rule, New Mexico joined this group of states in 1949 in the case of *Chase v. New Mexico Publishing Co.*, because "the parties are in accord that the complaint is insufficient unless the publication is libelous per se, no actual or special damages having been alleged."³

In 1970 New Mexico, in *Reed v. Melnick*, rejected the libel per quod rule, modified its holding in *Chase* and the cases that followed it, and held that "the better rule, which we hereby adopt" is the rule of section 569 of the *Restatement* with this addition: "provided, however, that where the defamatory character of the writing can only be shown

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1. W. PROSSER, *THE LAW OF TORTS* 797 (1st ed. 1941) (footnotes omitted).
2. Prosser, *Libel Per Quod*, 46 VA. L. REV. 839 (1960); Eldredge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966).
3. *Chase v. New Mexico Pub. Co.*, 53 N.M. 145, 147-48, 203 P.2d 594, 595 (1949).

by reference to extrinsic facts the plaintiff must plead and prove either: (1) that the publisher knew or should have known of the extrinsic facts which were necessary to make the statement defamatory in its innuendo; or (2) special damages."⁴

So far as the case law is concerned, this decision announces a rule of law never before stated by any appellate court in the United States. Mr. Justice Watson said: "Thus we adopt § 569 of the Restatement of Torts, together with what we understand to be the intended meaning of the amendment adopted at the 1966 meeting of the American Law Institute."⁵

The amendment referred to was to my motion "that the Institute retain the present section 569 and its comments; that it reject the proposed substitute and the proposed new comments, with the understanding that the present comments may be expanded to reflect recent developments in the law."⁶ The amendment to this motion was offered by Dean John Wade, a member of the Council of The American Law Institute and an Adviser on Torts to the Reporter and to the Council, and it read as follows: "I would like to suggest an amendment to Mr. Eldredge's motion to the effect that the old section 569 be retained with the addition at the end of it of a clause reading like this: 'unless he knew or should have known of the extrinsic facts which were necessary to make the statement defamatory in its innuendo.'"⁷ Dean Wade's motion to amend was seconded by Judge Breitel of New York, and after considerable debate was carried by a vote of 69 to 58.⁸ The meeting then recessed for lunch.

This vote changed section 569 to provide that the publisher of an unprivileged libel "is liable to the other although no special harm or loss of reputation results therefrom unless he knew or should have known of the extrinsic facts which were necessary to make the statement defamatory in its innuendo." This does not make sense, but it is what 69 members of the august American Law Institute voted for. I submit that this language relieves the publisher of liability when he knew the innocent-on-its-face statement was defamatory. That is not what Dean Wade or Judge Breitel intended.

4. *Reed v. Melnick*, 81 N.M. 608, 610, 471 P.2d 178, 180 (1970).

5. *Id.*

6. A.L.I. PROCEEDINGS 434 (1966). The proposed substitute was presented by the Reporter, Dean Prosser, in the RESTATEMENT (SECOND) OF TORTS § 569 (Tent. Draft No. 12, 1966).

7. A.L.I. PROCEEDINGS 448 (1966).

8. *Id.* at 460.

I believe that they intended to amend section 569 to read:

- (1) Except as stated in subsection 2,
One who falsely, and without a privilege to do so, publishes matter defamatory of 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.
- (2) Where the defamatory character of the libel can only be shown by reference to extrinsic facts the publisher is not liable unless he knew or should have known these extrinsic facts.

Their thought was that when the statement was innocent on its face⁹ and the publisher neither knew nor should have known of the extrinsic facts that gave the words their defamatory sting,¹⁰ he should not be liable. But the language of the amendment does not so provide, and it does not state what happens to the completely innocent publisher of a libel when the plaintiff pleads and proves special damages. The completely innocent slanderer is liable in such a case.¹¹ The 1970 decision in *Reed v. Melnick*¹² holds the innocent publisher of libel liable when he causes special damages. That appears to be sound, but it is difficult to find it to be the "intended meaning of the [Wade] amendment." No such intent can be derived from the words of the amendment.

When the Institute reconvened after the luncheon recess, President Darrell ruled that The American Law Institute had "voted to retain the present black letter section with the language added to it which Dean Wade spoke of this morning."¹³ This had been only a tentative vote, however, and during the luncheon recess Dean Prosser as Reporter, Dean Wade, and some other Advisers had reviewed the amendment and decided that it could not be accepted, even as intended by Dean Wade. Dean Prosser said, "I think the Reporter should attempt to draft another section and bring it back next year." President Darrell ruled: "It is quite clear that this will have to be brought back to the meeting next year. If you [Mr. Eldredge] do not like the formulation, or anybody else does not like the formulation that the Reporter comes in with pursuant to the mandate to him, you will have every opportunity, and you can marshal your forces for this purpose later to defeat the amendment and move again for the unadulterated original section."¹⁴ The question was

9. *E.g.*, *Morrison v. Ritchie & Co.* [1901-02] Sess. Cas. 645, 39 Scot. L.R. 432 (Scot. 2d Div.) (classic case involving the birth announcement of twins).

10. In *Morrison* the parents had been married only one month.

11. See RESTATEMENT OF TORTS § 575 (1938).

12. 81 N.M. 608, 471 P.2d 178 (1970).

13. A.L.I. PROCEEDINGS 461-62 (1966).

14. *Id.* at 462.

not brought back to the 1967 meeting, and final action is still in the future. As this is written, section 569 as published in 1938 still stands.

The controversy that developed at the Institute's annual meeting was initiated by Dean Prosser's proposed revision of section 569, which says:

- (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.

This proposed revised section 569 provides that when the defamatory statement is innocent on its face the publisher is not liable "without proof of special damages, in any case where it would not be so actionable if it were slander."¹⁵ Dean Prosser cited nineteen cases in thirteen states, including seven in New York, to support his position.¹⁶ The American case law on this point is in conflict. There is authority to support Dean Prosser's position and also authority to support the original section 569, but there was no authority in 1966 to support Dean Wade's amendment. It was not a restatement of existing case law; it was pure legislation. Judge Dimock of New York said: "I oppose the amendment, because I think by adopting it we would be engaging in the dangerous process of making law."¹⁷ Dean Prosser said: "If I were legislating, I should be entirely in sympathy with Dean Wade's proposal."¹⁸ He added that if he had, as Reporter, presented it "I think I should have been accused by a great many people of taking a leap into the wild blue yonder

15. RESTATEMENT (SECOND) OF TORTS § 569, Note to Institute at 29-30 (Tent. Draft No. 12, 1966).

16. *Id.* § 569, at 38-43. These cases are also cited and discussed in Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629, 1639-45 (1966).

17. A.L.I. PROCEEDINGS 455 (1966).

18. *Id.* at 457.

. . . . I could not as a Reporter have brought in something that just isn't in the case law, but maybe he has put his finger on something that I don't know."¹⁹

Dean Wade said: "I would certainly have no idea of trying to make new law contrary to existing law."²⁰ He explained, "I would suggest that if you take the time to look through the cases which have been collected by Mr. Prosser, you will find that in the great majority of these cases, though the Courts didn't talk about it, where the defendant was innocent in the sense that he did not know about these intrinsic facts, then they required the proof of actual damages, but where they thought the defendant did know" they did not.²¹ In his seconding speech Judge Breitel said

with the exception of the dictum by Judge Traynor, there are no cases that develop a ratio decidendi that supports the view that [Dean Wade] expresses and that I now second, but I think the Institute is faced with one of the most important problems in this area. . . . the situation regarding the facts in almost all of the cases . . . can be explained by a new rationale that has not been supplied by the courts. I suggest that the Institute promotes its highest function when it does supply a rationale that will explain the decisions in the courts, and will assist the courts in developing a better rationale than apparently they have been capable of doing up until the present time.²²

I had studied thoroughly each one of the nineteen cases upon which Dean Prosser relied, and I protested "we are going into the complete blue sky to try to do what Dean Wade suggests."²³ I explained:

These cases that have been decided are generally decided on the pleadings. There is the averment in the inducement—of extrinsic facts; and then in the innuendo they set forth the defamatory meaning in the light of those extrinsic facts. When the courts decide that the complaint does or does not state a cause of action without allegation of special damages, they are not considering anything about whether there was knowledge upon the part of the defendant or not of those extrinsic facts²⁴

After the 1966 meeting of The American Law Institute I restudied each one of these nineteen cases, and it is clear to me that the facts—pleaded or otherwise stated—as set forth in the appellate court opinions in these cases do not support the "rationale" stated by Dean Wade and Judge Breitel. Not even one of them supports it and the "great majority" of them are flatly contrary to it because the plaintiff lost even though the defendant knew or should have known the falsity of his

19. *Id.* at 458-59.

20. *Id.* at 457.

21. *Id.* at 448.

22. *Id.* at 449.

23. *Id.* at 451.

24. *Id.* at 450.

statement. Let us look at each one of these nineteen cases to determine the accuracy of the foregoing statement.

(1) *Ilitzky v. Goodman*,²⁵ in Arizona: The plaintiff specifically pleaded that the letter was part of a course of conduct which the defendant maliciously pursued and "that the facts and the meaning of the letters were known by the defendants at the time to be false."²⁶ Nonetheless, the complaint was dismissed.²⁷ This case is contrary to the Wade amendment because the absence of an allegation of special damages was fatal despite the presence of an allegation that the defendants knew the letter was false.

(2) *McBride v. Crowell-Collier Publishing Co.*,²⁸ a federal case applying Florida law: The plaintiff sued a publishing company for an alleged libelous magazine article naming him as the head of a gambling establishment. The case was dismissed on the pleadings, and I can find nothing in the opinion that sheds any light on whether the defendant knew or should have known of the facts that made the statement defamatory. There certainly is nothing in the opinion that supports the Wade amendment.

(3) *Karrigan v. Valentine*,²⁹ in Kansas: The case was dismissed on the complaint, which specifically pleaded that "said defendants, having full knowledge and/or should have had full knowledge of the fact that the plaintiff was not married . . . willfully and maliciously published"³⁰ etc. Despite an allegation that clearly states a cause of action under the Wade amendment, the failure to plead special damages was held to be fatal.³¹

(4) *Axton Fisher Tobacco Co. v. Evening Post Co.*,³² in Kentucky: The trial court sustained the defendant's demurrer to the complaint that the plaintiff had been libeled by the publication, which had said that plaintiff paid lower than union wages and used scab advertising. The appellate court upheld the trial court on this part of its decision. The pleaded extrinsic facts concerning the plaintiff's relations and contracts

25. 57 Ariz. 216, 112 P.2d 860 (1941).

26. *Id.* at 220, 112 P.2d at 862.

27. The Supreme Court of Arizona found, however, that special damages were pleaded sufficiently and reversed the lower court on that point.

28. 196 F.2d 187 (5th Cir. 1952).

29. 184 Kan. 783, 339 P.2d 52 (1959).

30. *Id.* at 786, 339 P.2d at 55.

31. The Supreme Court of Kansas found, however, that special damages were pleaded sufficiently to state a cause of action for libel per quod and held that the demurrer was erroneously sustained on that point.

32. 169 Ky. 64, 183 S.W. 269 (1916).

with labor unions were readily ascertainable and should have been known by the defendant. I do not find any support for Dean Wade in this case.

(5) *Campbell v. Post Publishing Co.*,³³ in Montana: The complaint alleged that a news item concerning an event which did not take place identified the plaintiff in such a way that friends would think she had committed bigamy. The court said: "There being no allegation of special damages, the complaint was insufficient to state a cause of action."³⁴ The opinion is silent on whether there were any allegations that the defendants knew or should have known of the publication's falsity, and I would conclude that the court thought this was quite immaterial. I construe the case as not supporting the Wade amendment.

(6) *Chase v. New Mexico Publishing Co.*,³⁵ in New Mexico: Here the plaintiff complained of innuendo in an editorial. The plaintiff specifically pleaded that the defendant newspaper previously had published articles accusing the plaintiff of misconduct and articles concerning the misconduct of other persons named in the editorial. These are the extrinsic facts, and it is clear that they were completely known to the newspaper. Indeed, the plaintiff's complaint was that the defamatory sting arose when the material that the defendant previously had published was read with the editorial. Nonetheless, the complaint was dismissed for the failure to allege special damages. I consider this case to be squarely contrary to the Wade amendment.

(7) *O'Connell v. Press Publishing Co.*,³⁶ in New York: Judgment for the plaintiff was reversed on appeal. There is no reference to what the plaintiff pleaded or did not plead, proved or did not prove, concerning the defendant's knowledge of the extrinsic circumstances. In the lower court, Judge Stapleton had ruled that the article was defamatory on its face, saying that it "fairly charges him with an offense against the statutes cited without the necessity of extrinsic averments."³⁷ I find nothing in the opinion of Judge Collin in the Court of Appeals—and it may be noted that Cardozo and Seabury were among the dissenters—that offers any support to the Wade amendment.³⁸

33. 94 Mont. 12, 20 P.2d 1063 (1933).

34. *Id.* at 18, 20 P.2d at 1064.

35. 53 N.M. 145, 203 P.2d 594 (1949).

36. 214 N.Y. 352, 108 N.E. 556 (1915).

37. *O'Connell v. Press Pub. Co.*, 137 N.Y.S. 332, 337 (Sup. Ct. 1912).

38. Dean Prosser conceded at the 1966 meeting that the decision of the Court of Appeals on May 5, 1966, in *Hinsdale v. Orange County Publications, Inc.*, 17 N.Y.2d 284, 217 N.E.2d 650, 270 N.Y.S.2d 592 (1966), overruled this case and the other New York cases he cited from lower courts. A.L.I. PROCEEDINGS 432 (1966).

(8) *Kuhn v. Veloz*,³⁹ in New York, Appellate Division: In this case the article, procured by the defendant for publication, concerned "the origin of gowns worn by the defendant Yolanda Veloz, a theatrical performer. . . . The article states that defendants designed many of the gowns described."⁴⁰ It mentioned the plaintiff as "chief seamstress" for the defendant. The plaintiff pleaded she designed all of the gowns. It is obvious that the defendant did know the pleaded extrinsic facts that the plaintiff "was a creator of gowns, specializing in theatrical costumes, and widely known in that line as the designer of Yolanda Veloz's gowns."⁴¹ Yet, the court ruled that the plaintiff must plead special damages and dismissed the complaint. This case is squarely contrary to the Wade amendment.

(9) *Solotaire v. Cowles Magazine, Inc.*,⁴² in New York, Supreme Court: One defendant wrote and the other published an article that described the plaintiff's husband as a bachelor. The plaintiff pleaded that "she and her husband married in 1929 and have one son, 21 years of age," that "for the past 17 years, plaintiff, her husband and son maintained a marital and family domicile in this County and were well and favorably known," and that the statements describing her husband as a bachelor were "recklessly made" to injure the plaintiff's reputation.⁴³ The averment that the statements were "recklessly made" is particularly important. It is perfectly obvious that the extrinsic facts concerning marital status were readily available in the community. The complaint, however, was dismissed. I submit that this case is squarely contrary to the Wade amendment.

(10) *Macri v. Mayer*,⁴⁴ in New York, Supreme Court: The court dismissed an action for libel that alleged that the defendant had published an article which mistakenly gave credit for plaintiff's advertising slogan to one Mr. Williams. The report is completely silent on any allegation concerning what the defendant knew or should have known. I would think, however, that in advertising circles the authorship of a "successful advertising slogan" important enough to be written up in an article would be either well known or determinable upon a reasonable investigation. This case appears to me to be contrary to the Wade amendment; in any event, I do not see how it gives it any support.

39. 252 App. Div. 515, 299 N.Y.S. 924 (1937).

40. *Id.* at 516, 299 N.Y.S. at 925.

41. *Id.*

42. 107 N.Y.S.2d 798 (Sup. Ct. 1951).

43. *Id.* at 799.

44. 22 Misc. 2d 429, 201 N.Y.S.2d 525 (Sup. Ct. 1960).

(11) *Everett v. Gross*,⁴⁵ in New York, Appellate Division: The defendant's article stated that the plaintiff threatened to see that certain track stewards would lose their job if they upheld a foul claim against the winning horse. The extrinsic facts pleaded in the complaint were that "Mrs. Everett is the president, a director, and the majority stockholder of the corporate plaintiff and the head of Arlington Park Jockey Club,"⁴⁶ where the stewards operated. The appellate division reversed the lower court's order denying a motion to dismiss. I suggest that in horse racing circles these facts must have been widely known or readily ascertainable. The individual, Milton Gross, who wrote the story for the *New York Post* must have known who Mrs. Everett was, and that her corporate positions were what made her alleged threats to the stewards so serious. Nevertheless, the appellate division unanimously reversed the lower court and dismissed the complaint. I construe this case as being contrary to the Wade amendment.

(12) *Legion Against Vivisection v. Grey*,⁴⁷ in New York, Supreme Court: Neither the facts nor the pleadings are mentioned in the opinion. The court set aside the 4,000 dollar verdict for the individual plaintiff on the fifth cause of action for failure to prove special damages, and set aside the nominal verdict for the corporate plaintiff on the second cause of action for (1) failure to prove special damages, and (2) lack of corporate authority to prosecute the action. As the court did not mention whether the defendant knew or should have known the extrinsic facts, all I can conclude is that this was a matter of no importance on the question of setting aside the verdicts. Even if this case isn't contrary to the Wade amendment, it certainly does not give any support to it.

(13) *Flake v. Greensboro News Co.*,⁴⁸ in North Carolina: I doubt that this case is entitled to much weight in view of the fact that sixteen years after *Flake* the Supreme Court of North Carolina cited section 569 with approval⁴⁹ and in light of an excellent law review note that has severely criticized the case.⁵⁰ The facts in *Flake* were that the plaintiff was a well-known entertainer who had broadcast over New York radio station WABC. The *Greensboro Daily News* mistakenly had inserted a

45. 22 App. Div. 2d 257, 254 N.Y.S.2d 561 (1964).

46. *Id.* at 258, 254 N.Y.S.2d at 563.

47. 63 N.Y.S.2d 920 (Sup. Ct. 1946).

48. 212 N.C. 780, 195 S.E. 55 (1938).

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

50. 33 N.C.L. Rev. 674 (1955).

picture of her in a bathing suit into an advertisement for "Mlle. Salle Payne" of the "Folies de Paree," which the plaintiff pleaded was a sensual performance or sex parade. Greensboro presumably was the plaintiff's family home because her mother sent the paper to her in New York, and the plaintiff apparently was well known in North Carolina because the paper promptly published a full explanation of the mistake and an apology. The court said "[t]he record does not disclose just how the mistake occurred or how the Greensboro News Company came into possession of the plaintiff's photograph, whether the news company had the photograph in its files in connection with plaintiff's campaign for publicity, or it was furnished by Folies de Paree."⁵¹ The court held that the failure to prove special damages required setting aside the 6,500 dollar verdict. There is no discussion of whether the defendant knew or should have known that the photograph was that of the plaintiff rather than that of Mlle. Payne. I would conclude that the defendant was careless and should have known. If that conclusion is correct, then the case is contrary to the Wade amendment.

(14) *Ellsworth v. Martindale-Hubbell Law Directory, Inc.*,⁵² in North Dakota: In this case the plaintiff, a lawyer, complained about his listing in the *Martindale-Hubbell Law Directory*, which rates lawyers and represents their ratings by symbols that can only be understood by using confidential keys. The court said "[t]he plaintiff claims to have been damaged by reason of the publication of blanks after his name, and in order to explain why such publication is defamatory he pleads excerpts from the [defendant's] confidential key, along with other matter."⁵³ The other matter, along with its own confidential key, were all extrinsic facts that were clearly known to the defendant. The court, however, reversed the lower court and dismissed the complaint. This case is squarely contrary to the Wade amendment.

(15) *Moore v. P.W. Publishing Co.*,⁵⁴ in Ohio: Dean Prosser conceded that his case was decided incorrectly. The plaintiff was a 60-year-old female Negro, long active in community affairs and Democratic Party politics in Akron, Ohio. She complained that, after Governor DiSalle had spoken before a group of Negro Democrats on March 6, 1962, the defendant newspaper ran the headline, "Angry DiSalle Calls Akron Woman 'Uncle Tom'" and published the plaintiff's picture with the article. The plaintiff testified that the phrase "'Uncle Tom' . . . has

51. 212 N.C. at 783-84, 195 S.E. at 58.

52. 66 N.D. 578, 268 N.W. 400 (1936).

53. *Id.* at 592-93, 268 N.W. at 408 (opinion on rehearing).

54. 3 Ohio St. 2d 183, 209 N.E.2d 412 (1965).

an established meaning in ordinary usage today *among the Negro population generally* as a person who will sell out his community, his race, who will do things for himself rather than for his people.”⁵⁵ There was other testimony to the same effect. If these be considered “extrinsic facts,” they certainly are facts that would be known to the city editor of the *Cleveland Call and Post*, which printed the headline. The jury made a special finding that the name “‘Uncle Tom’ . . . imputed to her [plaintiff] conduct that tends to harm her reputation and lower her in the estimation of the community . . .”⁵⁶ and found a total verdict of 32,000 dollars which included 25,000 dollars punitive damages. The Court of Appeals affirmed on the ground the headline was “libel per se.” The Supreme Court found that the newspaper references were not libelous per se, and entered a judgment for the defendant newspaper. I consider the case to be contrary to the Wade amendment.

(16) *Hargrove v. Oklahoma Press Publishing Co.*,⁵⁷ Oklahoma: Judgment on demurrer for the defendant was affirmed. The court said: “We believe it would be stretching the rule of libel too far to say that a false imputation that a man is a Negro is a libel upon his wife.”⁵⁸ I do not think this case stands for much of anything. Hargrove was a white man and so was his wife. People who did not know them would assume from the story—keep in mind this is Oklahoma in 1925—that Hargrove and his wife were both Negroes. People who did know the Hargroves would know that he was not a Negro and the story could not carry the innuendo, then, that Mrs. Hargrove was married to a Negro. I think the court just decided that there was no defamation at all of the plaintiff in this case. Consequently, I think that the case does not shed any light, one way or the other, on the Wade amendment.

(17) *Fite v. Oklahoma Publishing Co.*,⁵⁹ in Oklahoma: In this case there was no proof at all of extrinsic circumstances making the newspaper article defamatory. The court specifically said: “The article does not charge that she attempted to lobby with certain senators in violation of the law. . . . Many good citizens are lobbyists . . .”⁶⁰ The action was dismissed because the plaintiff did not prove she had been defamed. The case is not relevant to the present question.

(18) *Fry v. McCord*,⁶¹ in Tennessee: The plaintiff sued for libel

55. *Id.* at 189, 209 N.E.2d at 416.

56. *Id.* at 190, 209 N.E.2d at 416.

57. 130 Okla. 76, 265 P. 635 (1928).

58. *Id.* at 79, 265 P. at 637.

59. 146 Okla. 150, 293 P. 1073 (1930).

60. *Id.* at 153, 293 P. at 1076.

61. 95 Tenn. 678, 33 S.W. 568 (1895).

and received a 400 dollar verdict, although the facts bring the case within the definition of injurious falsehood. The pleaded extrinsic facts were statements prepared by the defendant himself, who therefore obviously knew them. The Supreme Court, however, held it to have been error on the part of the trial court to fail to sustain the defendant's demurrer. This case is squarely contrary to the Wade amendment. Furthermore, it is one of the worst decisions in the United States. The court was so ignorant that the opinion writer said that the proposition that special damages need not be alleged in cases of libel "is not sustained by any authority whatever in the way of adjudicated cases."⁶²

(19) *Electric Furnace Corp. v. Deering Milliken Research Corp.*,⁶³ a federal case applying Tennessee law: With respect to the extrinsic circumstances, the court said: "It is further contended by the plaintiff that defendant knew of the representation of Electric Furnace that it would not disclose the names of its customers; that it would hold them in confidence; and that Deering Milliken sought to destroy this confidence and the good will between Electric Furnace and its customers by implying that Electric Furnace had voluntarily broken its promises. The plaintiff claims that the action of the defendant was knowingly and maliciously done. . . ."⁶⁴ In addition, the court referred to the clear testimony that before the letter was sent, the defendant's president showed it to the plaintiff's president who protested and "said that he had told his customers that he would not divulge their names and that he had built up good will with them which [defendant] sought to destroy by the letter."⁶⁵ Nonetheless, the case was dismissed for the failure to prove special damages. This case is squarely contrary to the Wade amendment.

This completes my review of the nineteen cases Dean Prosser relied on primarily, but the case of *Hinsdale v. Orange County Publications, Inc.*, should be mentioned. In evaluating the May, 1966, decision by the Court of Appeals of New York,⁶⁶ both Judge Breitel and Dean Wade made much of the fact that the plaintiff pleaded that the defendant knew or should have known of the extrinsic circumstances. The opinion of the court, however, did not refer to this as a fact of any juridical importance. In view of the way the opinion was written and what was emphasized, I cannot see that this case can really be cited as support for the Wade amendment.

62. *Id.* at 694, 33 S.W. at 572; see Eldredge, *supra* note 2, at 733 (my analysis of the case).

63. 325 F.2d 761 (6th Cir. 1963).

64. *Id.* at 763.

65. *Id.* at 764.

66. 17 N.Y.2d 284, 217 N.E.2d 650, 270 N.Y.S.2d 592 (1966).

In proposing his amendment Dean Wade said that he had “no idea of trying to make new law.” That statement, and the fact that he is now the Institute’s Reporter for Torts, leads me to hope that at the appropriate time he will ask the Institute to repeal the Wade amendment and approve section 569 as it appears in the *First Restatement*. With the Wade amendment gone there would be no support whatever for the 1970 New Mexico decision in *Reed v. Melnick*. It is to be hoped that it will not be followed, and that section 569 will be accepted without any change. In August 1966 the present section received additional support from the unusual decision of the Supreme Court of the State of Oregon, en banc, in the case of *Hinkle v. Alexander*.⁶⁷ In its first opinion in this case filed on March 9, 1966, the court affirmed the entry of a judgment n.o.v. for the defendant in a libel case for failure to prove special damages. A rehearing was allowed for the express purpose of having the entire court consider and determine the question “should we adhere to the common law rule in respect to defamation by libel which is adopted as Restatement, 3 Torts, Ch. 24, Section 569?”⁶⁸ The court referred to the controversy in The American Law Institute and said: “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.”⁶⁹ The court concluded: “It follows that the original opinion is withdrawn. The prior decisions of this court that have held that special damages must be proved when extrinsic facts are needed to demonstrate a defamation are no longer to be considered authoritative.”⁷⁰ The court reinstated the jury verdict and entered judgment for the plaintiff. In a concurring opinion, Judge Lusk said that 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. The difficulty in many cases of libel of proving special damages is obvious and the argument that there is less danger of harm from a writing which requires proof of extrinsic facts to show its defamatory character than from a writing defamatory on its face, is to my mind not convincing.⁷¹

Every appellate court in recent years that has specifically analyzed the libel per quod rule and considered the rule stated in the present section 569 has rejected the per quod rule and, except for *Reed v.*

67. 244 Ore. 267, 411 P.2d 829, *rev'd*, 244 Ore. 267, 417 P.2d 586 (1966).

68. 244 Ore. at 272, 417 P.2d at 587.

69. *Id.* at 277, 417 P.2d at 589.

70. *Id.* at 279, 417 P.2d at 590.

71. *Id.* at 280-81, 417 P.2d at 591 (concurring opinion of Lusk, J.).

Melnick, has accepted section 569 without any limitation on it. In *Reed v. Melnick*, the court thought that in the absence of "fault" the publisher should not be liable. In so concluding, it was influenced by a New Mexico statute that protects a visual or sound broadcaster from liability for defamation unless it "has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast."⁷²

The common law of defamation, however, requires neither "fault" nor negligence. It is within the field of strict or absolute tort liability and the present strong tendency is to expand rather than restrict the scope of that field. The great function of an action for defamation is to give the innocent person, whose most precious asset—his good name—has been injured or destroyed, an opportunity to redeem it by a public vindication. In *Reed v. Melnick*, the court recognized "that an injury may be as great where the defamation is latent as where it is patent. . . ."⁷³ This being so, why should the plaintiff be barred from vindicating his good name merely because he fails to prove negligence? This requirement will be an insuperable barrier to vindication in many cases, just as it is when the plaintiff is required to prove special damages.⁷⁴

The innocent publisher should not be subject to punitive damages, and, even in the absence of a retraction statute, he can voluntarily retract and minimize the compensatory damages. This results in the prompt public vindication that the plaintiff needs.

In the light of these factors, plus the fact that defamation law is not "fault" law but strict liability law, there is no valid reason for the Wade amendment or any other amendment to section 569.

72. 81 N.M. at 610, 471 P.2d at 180. These statutes generally are a result of intense lobbying pressures by the broadcasting industry.

73. *Id.*

74. "This requirement of . . . special damages is a serious hurdle to a recovery in either libel or slander actions." 81 N.M. at 610, 471 P.2d at 180.