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Libel Per Se and Special Damages

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the haphazard dividing lines between legislative and judicial[108] functions appears commendable. If discrimination and prejudice are vices for the board wearing its judicial gowns, they are no less so because it momentarily adopts the garb of the legislator.

Any comprehensive change in the rules on bias must depend, of course, on the legislature, whose creatures the modern-day agencies are. But if the legislature does not choose to act, it would seem to be the duty of the courts to assert more vigorously their concern for the rights of the individual against biased government agencies. As Mr. Justice Douglas stated recently, speaking of the due process clause: "These safeguards and guaranties are designed to protect the citizen not only against mobs, but against government itself. Procedural due process gives protection against overreaching officials."[109] It is precisely such protection that is needed to combat potential partiality within the modern administrative system.

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LIBEL PER SE AND SPECIAL DAMAGES

I. INTRODUCTION

Toward the end of the last century a few of the American courts began to express the view that allegation and proof of special damages is necessary in libel actions unless the defamatory meaning of the words is apparent on their face.[1] Although none of these courts appeared to realize it, this notion was entirely of their own invention.[2] Under the orthodox theory, which went virtually unquestioned

108. Low v. Town of Madison, 135 Conn. 1, 60 A.2d 774 (1948).
109. Douglas, *On Misconception of the Judicial Function and the Responsibility of the Bar,* 59 COLUM. L. REV. 227, 228 (1959).

1. Walker v. Tribune Co., 29 Fed. 827 (N.D. Ill. 1887) (denying recovery because the defamatory meaning of the word "crank" was not apparent on its face); Tonini v. Cevasco, 114 Cal. 266, 46 Pac. 103 (1896) (statement that plaintiff had been discharged for conduct "not irreprehensible" held defamatory on its face); Fry v. McCord Bros., 95 Tenn. 678, 33 S.W. 568 (1895) (recovery denied because defamatory sense of the words depended upon knowledge of circumstances extrinsic to statement, and no special damages were alleged); Continental Nat'l Bank of Memphis v. Bowdre, 92 Tenn. 723, 23 S.W. 131 (1893) (dictum).

2. "A peculiarity of the situation is that the parents of this odd creature—the courts—do not realize, despite the labor pains of its birth, that they have brought forth a child." Carpenter, *Libel Per Se in California and Some Other States,* 17 So. CAL. L. REV. 347 (1944). In what may have been the first decision to assert the rule the court expressed the opinion that the law was "well settled" in regard to it. Walker v. Tribune Co., 27 Fed. 827 (N.D. Ill. 1887). The same attitude is prevalent in all the early opinions. See cases cited *supra* note 1.

in the century preceding these decisions,[3] all written defamation is actionable without proof of special damages,[4] whether it is designated libel *per se* or libel *per quod*. Words which are defamatory on their face are libelous *per se;* words which are *prima facie* innocent, but defamatory in light of the circumstances of their publication, are libelous *per quod*. In order to state a cause of action in libel *per quod,* it is necessary to allege the extrinsic circumstances imparting a defamatory meaning to the langnage,[5] but, under the orthodox theory, special damages are never an essential allegation. In slander the rule is otherwise. Unless the language is slanderous *per se*—that is, unless it charges that the plaintiff has committed an indictable offense,[6] or imputes that he has a loathsome disease,[7] or that he is unfit to perform his office, business or profession[8]—proof of special damages is necessary. This rule is not based upon logic; it is the accidental product of a jurisdictional contest between the common law and ecclesiastical courts of England, which the tort of libel was fortunate enough to escape.[9] Commentators have generally denounced

3. Lord Mansfield disliked the rule, and would have liked to repudiate it, but recognized that it was too well-established by precedent to be overturned. See Thorley v. Kerry, 4 Taunt. 355, 128 Eng. Rep. 367 (1812).

4. This rule was first announced in King v. Lake, Hadres 470, 145 Eng. Rep. 552, (1670). The court gave the following justification for permitting a wider scope of actionability in libel than in slander: "although general words spoken once without writing or publishing them would not be actionable; yet here, they being writ and published, which contains more malice than if they had been spoken, they are actionable." 145 Eng. Rep. at 553.

5. The pleading alleging the extrinsic circumstances is called the inducement. The explanation of the relationship between the language and the circumstances is called the "innuendo." The allegation showing that the language is directed against the plaintiff is the "colloquium." Whereas the inducement and colloquium must be factual, rather than argumentative or explanatory, the office of the innuendo is purely explanatory, it having no evidentiary value of itself. See Age-Herald Publishing Co. v. Waterman, 188 Ala. 272, 66 So. 16 (1913). Slander pleading is subject to the same rules. See Carter v. Andrews, 33 Mass. 1 (1834).

6. *E.g.,* Martin v. Stillwell, 13 Johns. 275 (N.Y. 1816) (keeping a bawdy-house); Buckley v. O'Neil, 113 Mass. 193 (1873) (maintenance of a gambling place).

7. *E.g.,* Golderman v. Stearns, 73 Mass. 181 (1856) (venereal disease); Williams v. Holdridge, 22 Barb. 396 (N.Y. 1859) (leprosy). Some courts have held that imputation of disease is not actionable if phrased in the past tense. See TOWNSHEND, SLANDER AND LIBEL, 260, n.6 (3d ed. 1877).

8. *E.g.,* Secor v. Harris, 18 Barb. 425 (N.Y. 1854) (statement that physician's ignorance had killed two children and a woman); Fowles v. Bowen, 30 N.Y. 20 (1864) (charge of dishonesty directed against businessman).

9. Slander was originally considered a spiritual offense, and jurisdiction over it was exclusively in the ecclesiastical courts. The *per se* categories and the special damages requirement represent the extent to which this jurisdiction was taken over by the common law courts. Jurisdiction over slander imputing criminal conduct was apparently rationalized on the basis that the common law courts had jurisdiction over punishment of criminal conduct itself. Jurisdiction was taken where special damages were alleged on the basis that pecuniary loss is temporal, rather than spiritual. The claim of the common law courts to the other two categories was apparently based on the likelihood that imputation of disease or unfitness for one's occupation would result in temporal loss. By the time the common law was in a position

the special damages requirement in slander on the basis that the emphasis in defamation actions should be upon injury to reputation, rather than upon pecuniary loss.[10] Although the courts lacked the initiative to dispose of this anachronistic requirement, they showed no inclination, prior to the appearance of the above-mentioned decisions, to compound the error by introducing special damages into the law of libel. In spite of its lack of historical foundation, however, and in spite of the severe criticism it has received from writers,[11] the notion that special damages are necessary in actions of libel *per quod* has become increasingly popular with the courts, and probably represents the prevailing view among those which have considered the question.[12]

II. HISTORICAL DEVELOPMENT

Whatever rational arguments are advanced in favor of it after the fact, it is clear that this rule had its origin largely in judicial confusion. This confusion resulted from the misinterpretation of a theory propounded by John Townshend in his treatise entitled *Slander and Libel*,[13] and contained in several nineteenth century libel opinions.[14] Townshend's thesis was that the gist of all defamation actions is pecuniary injury,[15] and that, unless the court can presume the oc-

to expand its jurisdiction to include all oral defamation, the pressure of slander litigation had become so great that the courts were inclined to restrict, rather than expand, this jurisdiction. See 8 HOLDSWORTH, HISTORY OF ENGLISH LAW 346-54 (4th ed. 1926); PROSSER, TORTS § 92 (2d ed. 1955); PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 427-45 (2d ed. 1936); Veeder, *History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903).

10. 8 HOLDSWORTH, HISTORY OF ENGLISH LAW 365-66 (4th ed. 1926); POLLOCK, TORTS 324 (13th ed. 1929); 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 273 (1906); Veeder, *History and Theory of the Law of Defamation*, 4 COLUM. L. REV. 33 (1904).

11. "This article is written for the benefit of lawyers and courts of the States that have produced the new offspring, so they may see that it is a new creature, and that it is ugly and illegitimate and ought promptly to be strangled." Carpenter, *Libel Per Se in California and Some Other States*, 17 So. CAL. L. REV. 347 (1944). The line of New York cases accepting the rule is severely criticized in SEELMAN, LAW OF LIBEL AND SLANDER § 42 (1941). See also MCCORMICK, DAMAGES 417-18 (1935); PROSSER, TORTS 588 (2d ed. 1955).

12. PROSSER, TORTS 588 (2d ed. 1955). California has enacted the rule into statute. CAL. CIV. CODE § 45 a (1945).

13. TOWNSHEND, SLANDER AND LIBEL (3d ed. 1877).

14. See cases cited in note 21 *infra*.

15. "We do not intend to deny that the law does in fact, and to a great extent, protect reputation; but we intend to be understood as insisting that, where the law does protect reputation, it does so indirectly, by means of a fiction—an assumption of pecuniary loss. In theory, the action for slander or libel is always for pecuniary injury, and not for injury to the reputation." TOWNSHEND, SLANDER AND LIBEL (3d ed. 1877). This much of Townshend's thesis coincides with Holdsworth's analysis of the historical basis of libel. See 8 HOLDSWORTH, HISTORY OF ENGLISH LAW, 365 (4th ed. 1926). *But see* Veeder, *The History and Theory of the Law of Defamation*, 4 COLUM. L. REV. 33, 34 (1904), stating that Townshend's analysis is "historically untrue." The better modern scholarship views defamation as injury to reputation, which is deemed a "relational," rather than a pecuniary interest. See PROSSER, TORTS § 92 (2d ed. 1955); Green, *Relational Interest*, 31 ILL. L. REV. 35 (1936).

currence of such injury from the severity of the language, pecuniary loss in the form of special damages must be pleaded by the complaining party. Where the presumption arises, the language is said to be actionable *per se*. Oral language is actionable *per se* when it charges criminal conduct, disability in business, contraction of disease, or want of chastity; written language is actionable *per se* when it tends "'to bring a party into public hatred or disgrace', or 'to degrade him in society' or expose him to hatred contempt or ridicule . . . .'"[16] Since this latter definition is sufficiently broad to include all written defamation, the result of its application is to make all of what is conventionally called libel libelous *per se*. Taken in light of this definition, Townshend's statement that special damages are necessary unless the language is libelous *per se* means only that special damages are necessary in cases where the words are non-defamatory. This has always been so, although actions to recover special damages resulting from non-defamatory language are generally termed disparagement or injurious falsehood actions,[17] rather than libel actions. It seems clear, therefore, that Townshend's analysis contemplated no substantive change in the law of defamation.[18] It was merely an attempt to develop a uniform terminology and rationale for libel and slander, and to incorporate all actions based upon words into one theory, the gist of which is pecuniary injury.[19]

Instead of lessening judicial confusion, however, this use of terminology ultimately increased it.[20] So long as courts which used the term libel *per se* in connection with a presumption of pecuniary injury defined it as Townshend defined it, the substance of the hold-

16. TOWNSHEND, SLANDER AND LIBEL 263 (3d ed. 1877).

17. PROSSER, TORTS § 108 (2d ed. 1955).

18. "I disclaim innovation . . . ." TOWNSHEND, SLANDER AND LIBEL (3d ed. 1877) (preface page).

19. Slander and libel are to include all *"wrongs occasioned by language or effigy."* TOWNSHEND, SLANDER AND LIBEL § 22 (3d ed. 1877) including, apparently, injurious language directed against plaintiff's property. *Id.* at §§ 204-06.

20. Townshend did not invent the terminology, although the cases show he was a major influence in its dissemination. The term libel *per se* as he used it had some currency before the appearance of his treatise. The relative dearth of precedent for its use is illustrated, however, by the type of authority cited in the decisions which made use of it in the 1880's and 1890's. (These decisions are cited in note 21 *infra*.) Most of the citations are to slander cases which confine their discussion to slander *per se*, making no mention of libel *per se*. One frequently cited source of authority is the slander case of Terwilliger v. Wands, 17 N.Y. 54, 72 Am. Dec. 420 (1858). The citations apparently refer to the annotation following the case in the *American Decisions Reporter*, rather than to the case itself. This annotation states: "The following cases show that some special injury must have resulted from the libel or slander, and that special damages must be alleged . . . and . . . proved in order to sustain a recovery where the language is not actionable *per se*." This would offer support for Mr. Townshend and the courts adopting his thesis, except for the fact that all of the cases which the annotator cites as authority for his proposition are slander cases.

ings remained unchanged.[21] The trouble arose when the courts began to confuse their definitions. Whereas Townshend had used "libel *per se*" correlatively with "slander *per se*" to refer to the injuriousness of the probable effect of the language, its more usual meaning is that the defamatory sense of the language is apparent on its face without reference to extrinsic circumstances. By reading this latter definition into Townshend's proposition that special damages are necessary unless the words are libelous *per se*, some courts came to the illogical conclusion, which prevails in this country today, that special damages are necessary unless the words can be shown to be defamatory without proof of extrinsic circumstances.[22]

The cases adopting this rule agree that in order to be libelous *per se* the language must be defamatory on its face,[23] but there is a conflict

21. See Achorn v. Piper, 66 Iowa 694, 24 N.W. 513 (1885) (not libelous *per se*, because would not provoke plaintiffs to wrath, or expose them to public hatred or ridicule.); Urban v. Helmick, 15 Wash. 155, 45 Pac. 747 (1896) (hostile comment on plaintiff's manner of doing business not libelous *per se*); Hanaw v. Jackson Patriot Co., 98 Mich. 506, 57 N.W. 734 (1894) (term "libelous *per se*" used interchangeably with "libelous"); Hirschfield v. Fort Worth Nat'l Bank, 83 Tex. 452, 18 S.W. 743 (1892) (statement that plaintiff's note refused not libelous *per se* because it did not imply plaintiff's dishonesty); Morey v. Morning Journal Ass'n, 123 N.Y. 207, 25 N.E. 161 (1890) (libel *per se* is language tending to disgrace plaintiff and bring him into contempt and ridicule); Donaghue v. Caffey, 53 Conn. 43, 2 Atl. 397 (1885) (statement concerning lawful business practice not libelous *per se*); Newbold v. Bradstreet Co., 57 Md. 38 (1881) (statement that plaintiff had given a chattel mortgage not libelous *per se* because reasonable implication not dishonesty or insolvency). It is clear that these courts are merely using new terminology to express the idea that the language is not defamatory; substituting the term "libel *per se*" for "libel," and "failure to state special damages" for "failure to state a cause of action."

22. This confusion is illustrated graphically in the case of Fry v. McCord Bros., 95 Tenn. 678, 33 S.W. 568 (1895). The court quotes *Townshend* as follows: "language which, however, does not, as a necessary consequence, occasion damage to the party published is not per se libelous, and, in such cases, a right of action exists only when, as a necessary and proximate consequence of the publication, special damage ensues the party published." The Tennessee Court interprets this statement thus: "[W]e think a statement in substance and effect the same . . . is, that words which, upon their face and without the aid of extrinsic proof are injurious, are libelous per se; but if the injurious character of the words appear . . . only in consequence of extrinsic circumstances, they are not libelous per se." Fry v. McCord Bros., 95 Tenn. 678, 684-85, 33 S.W. 568, 570 (1895). See also Rowan v. Gazette Printing Co., 74 Mont. 326, 239 Pac. 1035 (1925) (attempt to correlate orthodox meaning of libel *per se* with slander *per se*); McNamara v. Goldan, 194 N.Y. 315, 87 N.E. 440 (1909) (libel *per se* is libel which is actionable without necessity of alleging extrinsic facts); Nichols v. Daily Reporter Co., 30 Utah 74, 83 Pac. 573 (1905) (citing Fry v. McCord Bros., *supra*); National Bank of Memphis v. Bowdre, 92 Tenn. 736, 23 S.W. 131 (1893) (citing *Townshend*).

23. This statement is subject to some qualification, in that one or two jurisdictions define libel *per se*, for purposes of determining the necessity for special damages, in terms of the slander *per se* categories. See Carwile v. Richmond Newspapers, 196 Va. 1, 82 S.E.2d 588 (1954); Proto v. Bridgeport Herald Corp., 136 Conn. 557, 72 A.2d 820 (1950) (semble). Thus, these courts have done what Lord Mansfield felt he could not do in 1812 because precedent was too firmly established. See note 3, *supra*. This view is more in line with Townshend's idea of libel *per se*, although much more restricted, than is the majority definition. In favor of it, it may be said that it confers uniformity

as to the applicable rule of construction for determining when words are defamatory on their face. The prevailing common law practice seems to have been to construe the words in their "plain and natural" import, and to hold them libelous *per se* if, when so construed, they appeared capable of conveying a defamatory meaning.[24] This practice is still followed in a number of jurisdictions.[25] Other jurisdictions require that the words be unambiguously defamatory—that is, they construe language innocently when it is reasonably susceptible of such construction.[26] This latter practice bears a close resemblance to the rule of construction which the seventeenth century English courts imposed upon slander. The outlawing of dueling in that century had diverted many disputes involving private insults from the field of battle into the courts of law, thus precipitating a flood of slander litigation. In self defense the courts devised the much-maligned[27] doctrine of *mitior sensu,* which required that words be given an innocent construction whenever humanly possible.[28] The application of this doctrine resulted in some of the most ingenious, ludicrous, and unjust opinions ever produced.[29] Although the modern libel cases have been less extreme, the requirement that language be unambiguously defamatory has constricted the libel *per se* concept significantly. Where this construction is adopted the rule requiring special damages where the language is not libelous *per se* is especially harsh.

III. Practical Significance

In jurisdictions where the language is construed according to its

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on the law of defamation, although most authorities would contend that making libel similar to slander is moving in the wrong direction to attain uniformity. See note 10, *supra.*

24. See the learned and thorough treatment of the matter in Age-Herald Publishing Co. v. Waterman, 188 Ala. 272, 66 So. 16 (1913).

25. *E.g.,* Myers v. Mobile Press-Register, Inc., 266 Ala. 508, 97 So. 2d 819 (1957); Gough v. Tribune-Journal Co., 73 Idaho 173, 249 P.2d 192 (1952); Sweeny & Co. v. Brown, 60 S.W.2d 381 (Ky. 1933); Rachels v. Deener, 182 Ark. 931, 33 S.W.2d 39 (1930); Jerald v. Houston, 124 Kan. 657, 261 Pac. 851 (1927); Wiley v. Oklahoma Press Publishing Co., 106 Okla. 52, 233 Pac. 224, (1924).

26. *E.g.,* Brewer v. Hearst Publishing Co., 185 F.2d 846 (7th Cir. 1950); Smith v. Los Angeles Bookbinders Union No. 63, 133 Cal. App. 486, 284 P.2d 194 (1955); Dalton v. Woodward, 134 Neb. 915, 280 N.W. 215 (1938); Ruble v. Kirkwood, 125 Ore. 316, 266 Pac. 252 (1928).

27. *E.g.,* 8 Holdsworth, History of English Law 358 (4th ed. 1926) ("evil results"); Prosser, Torts 580 (2d ed. 1955) ("artificial and absurd").

28. See 8 Holdsworth, History of English Law 353-56 (4th ed. 1926).

29. The art of construing in *mitior sensu* probably reached its zenith in the famous case of Holt v. Astgrigg, 79 Eng. Rep. 161 (1608). In that case the allegedly slanderous language was: "Sir Thomas Holt struck his cook on the head with a cleaver, and cleaved his head; the one part lay on the one shoulder, and another part on the other." The court held that this was not slanderous *per se* because "it is not averred that the cook was killed . . . . [N]otwithstanding such wounding, the party may yet be living; and it is then but trespass." The court was of the opinion that slander "ought to be direct."

plain and natural meaning in determining whether it is libelous *per se*, the effect of the special damages requirement upon the rights of litigants has been relatively slight. The requirement can have effect only in cases where the language is libelous *per quod*,[30] and in these jurisdictions, libel *per quod* occurs only where there are extrinsic circumstances which impart a defamatory meaning to words whose natural meaning is innocent. Since such instances comprise a small fraction of the cases,[31] most of the reiteration of the special damages requirement is dicta. Where cases calling for its application have arisen, the courts have tended to avoid defeating just claims by one of the following means: (1) *ad hoc* expansion of the definition of libel *per se* to include the language in litigation;[32] (2) generous interpretation of the concept of special damages to include the type of injury alleged in the complaint;[33] (3) sub silentio renunciation of the special damages rule;[34] (4) express renunciation of the special damages rule.[35]

The typical situation in which a court purports to invoke the rule is illustrated by the case of *Gough v. Tribune-Journal Co.*[36] The alleged libel was a news story stating that plaintiff, a public official, had walked out of a budget hearing. Plaintiff alleged that this was defamatory, in that it charged him with neglect of duty. This was the entire substance of his complaint. The court held that, because "the ordinary reader could not read into the story . . . a dereliction of duty"[37] the words were not libelous *per se*, and, since no special damages were alleged, no cause of action was stated. It will be noted that no extrinsic circumstances are alleged which would tend to alter the sense of the words. If, therefore, the words are not libelous in themselves, they are not libelous at all; the plaintiff has not attempted to state a case of libel *per quod*. In view of this, the court's statement of its holding says too much. The basic defect in the above complaint is not that it fails to allege special damages, but that it fails to allege a libel.[38]

30. If the language is libelous *per se*, there is recovery whether or not special damages are alleged. If it is not libelous at all, no court would permit recovery regardless of whether the special damages rule was adopted.

31. See cases cited, *infra* notes 38 and 42.

32. Balabanoff v. Hearst Consolidated Pub., Inc., 294 N.Y. 351, 62 N.E.2d 599 (1945) (see text, *infra*); Sydney v. MacFadden Newspaper Pub. Corp., 242 N.Y. 208, 151 N.E. 209 (1926) (see text *infra*).

33. Karrigan v. Valentine, 184 Kan. 783, 339 P.2d 52 (1959) (see text *infra*); Koerner v. Lawler, 180 Kan. 318, 304 P.2d 926 (1956).

34. Braun v. Armour & Co., 254 N.Y. 514, 173 N.E. 845 (1930) (see text *infra*); Smith v. Smith, 236 N.Y. 581, 142 N.E. 292 (1923) (see text *infra*).

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

36. 73 Idaho 173, 249 P.2d 192 (1952).

37. 249 P.2d at 195.

38. See also Schy v. Hearst Pub. Co., 205 F.2d 750 (7th Cir. 1953); Waller v. Tribune Co., 29 Fed. 827 (N.D. Ill. 1887); Meyers v. Mobile Press-

Although the courts consistently make grandiose statements about disregarding all "inducement, colloquium, and innuendo"[39] in determining whether language is libelous *per se,* they are seldom called upon to disregard anything other than the plaintiffs' improbable interpretation of the words. In *Nordlund v. Consolidated Electric Co-operative*[40] the alleged libel was an article pointing out the dangers and difficulties of using gas in the home. Plaintiff, a distributor of gas, contended that the meaning of this was that plaintiff (1) fraudulently deceived customers by selling them gas without revealing its dangers to them, and (2) violated a statute requiring gas to be odorized as a protection against such dangers. The court disregarded these assertions, held that the words were not libelous *per se,* and denied recovery because of the failure to plead special damages. The true basis for the holding would seem to be that the words are not libelous at all, since the courts are uniform in stating that a party may not make words libelous by arbitrarily assigning to them a meaning which they will not reasonably bear.[41] In cases such as this, the special damages requirement would seem to have no legitimate legal effect upon the rights of litigants;[42] although, as a practical matter, it may cause a court to be less hesitant about denying relief in a close case of language construction.

In a few cases the special damages issue has been squarely raised, and the court has applied the rule literally, refusing recovery because the libel is *per quod* and special damages are not alleged. In *Brodek v. Jones*[43] the plaintiff was a lawyer who had been employed to conduct negotiations for the defendant. The alleged libel was contained in a telegram which read, "Brodek [plaintiff] should be paid by the

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Register, Inc., 266 Ala. 508, 97 So. 2d 819 (1957); Nordlund v. Consolidated Elec. Co-op., 289 S.W.2d 93 (Mo. 1956); Dressler v. Mayer, 22 N.J. Super. 129, 91 A.2d 650 (1952); Cooper v. Miami Herald Publishing Co., 159 Fla. 296, 31 So. 2d 382 (1947); Nat'l Variety Artists, Inc. v. Mosconi, 9 N.Y.S.2d 498, 169 Misc. 982 (1939); Dalton v. Woodward, 134 Neb. 915, 280 N.W. 215 (1938); Rachels v. Deener, 182 Ark. 931, 33 S.W.2d 39 (1930); Talbot v. Mark, 41 Nev. 245, 169 Pac. 25 (1917); O'Connel v. Press Publishing Co., 214 N.Y. 352, 108 N.E. 556 (1915).

39. See note 4 *supra,* for definitions of these terms.

40. 289 S.W.2d 93 (Mo. 1956).

41. See cases cited in PROSSER, TORTS § 92, n.29 (2d ed. 1955).

42. See also Schy v. Hearst Pub. Co., 205 F.2d 750 (7th Cir. 1953) (statement that "it was the lowest blow ever struck at any representative of workers . . .—it really hurts," cannot be construed to mean a physical blow); Meyers v. Mobile Press-Register, Inc., 266 Ala. 508, 97 So. 2d 819 (1957) (charges of "iron curtain" tactics and "rapacious rule," uttered in a political context did not mean that plaintiff was opposed to the republican form of government); Talbot v. Mark, 41 Nev. 245, 169 Pac. 25 (1917) (statement that corporation was over-loaded did not mean that plaintiff, an employee, was dishonest); Urban v. Helmick, 15 Wash. 155, 45 Pac. 747 (1896) (charge that plaintiff was a hog in his business policies did not mean that he was actuated by the "low dirty groveling grasping gluttonous . . . instincts . . . of hogs or swine").

43. 212 App. Div. 247, 208 N.Y.S. 699 (1925).

one he effectively served, as were you."[44] The inducement alleged was that the person receiving the telegram had been paid by the person with whom defendant was negotiating, and that, therefore, the meaning of the telegram was that plaintiff had been disloyal to defendant, his client, by "effectively serving" the party with whom defendant was negotiating, rather than defendant himself. The court, however, refused to consider the extrinsic relationship of the parties, and held that, since the plain and natural meaning of the words themselves was non-defamatory, there could be no recovery in the absence of special damages. Other cases have reached similar results under roughly similar circumstances,[45] but they are few in number, and no very recent ones have been discovered.[46]

The New York Court of Appeals, which decided the *Brodek* case, has been inconsistent in its application of the rule. In the famous case of *Sydney v. MacFadden Newspaper Publishing Corp.*[47] the defendant had informed the public that plaintiff was "Fatty Arbuckle's latest lady love." The defamatory impact of this statement resulted from the unpublished fact that plaintiff was a married woman. The court considered this fact in its determination of the actionability of the language, even though no special damages were alleged, and held that a cause of action was stated.[48] Although this decision has the appearance of a complete repudiation of the special damages rule, subsequent New York decisions have continued to assert it.[49]

The *Sydney* opinion may be explainable as an adoption of the same sort of modification of the rule as is suggested in the later case of *Balabanoff v. Hearst Consolidated Publishing Corp.*[50] In that case the plaintiff had been accused by the defendant of having been a member of the Cheka. Although the allegedly libelous statement contained no such description, plaintiff was permitted to introduce evidence showing that the Cheka was a feared and hated organization. The court said that "the allegations of the complaint describing the organization of the 'Cheka' are essential to an understanding of the language . . . and do not, in our opinion, constitute extrinsic facts of such a character as to necessitate allegations of special damages."[51]

44. 208 N.Y.S. at 701.
45. See Ellsworth v. Martindale-Hubbell Law Directory, Inc., 66 N.D. 578, 268 N.W. 400 (1936); Sweeney & Co. v. Brown, 60 S.W.2d 381 (Ky. 1933); Fry v. McCord Bros., 95 Tenn. 678, 33 S.W. 568 (1895).
46. Note that the most recent case cited in the preceding footnote was decided twenty-four years ago.
47. 242 N.Y. 208, 151 N.E. 209 (1926).
48. Pound, J. registered a vigorous dissent, contending that the special damages rule should have been applied.
49. In National Variety Artists, Inc. v. Mosconi, 9 N.Y.S.2d 498, 169 Misc. 982 (1939), the court explicitly denied that the special damages rule has been repudiated in New York.
50. 294 N.Y. 351, 62 N.E.2d 599 (1945).
51. 62 N.E.2d at 600.

At another point in the opinion it is said that the language is actionable because it "fairly raises" the question of whether plaintiff is being defamed. It may be that, in both the *Sydney* and *Balabanoff* decisions, the Court of Appeals intended to take the following compromise position: where an allegedly libelous statement lacks information essential to an understanding of the full import of what is said, and the ordinary reader would realize this lack, and would be uncertain as to whether or not knowledge of this information would render the statement defamatory, the plaintiff may incorporate the information in his complaint to show that the statement was defamatory, even though no special damages are alleged. Thus, special damages would be required only where words are, on their face, both innocent and apparently self-explanatory. At the very least, this position represents a substantial modification of the special damages rule; even more significantly, it may indicate a feeling that the rule is unjust, and a disposition not to apply it should the question ever squarely be raised.

The New York position is rendered even more uncertain by the decision in *Smith v. Smith*[52] and *Braun v. Armour*.[53] Both of these are clear cases of libel *per quod,* and yet recovery is permitted with no mention being made of special damages. In the *Smith* case the defendant had filled out an application for a marriage license, answering the question as to whether he was a divorced person, "no". Plaintiff, the prospective bride, alleged by way of inducement that she and defendant had in fact formerly been married and divorced, and that the meaning of defendant's answer on the application blank was that plaintiff and defendant had been living together in an unmarried condition. In the *Braun* case the libelous words were contained in an advertisement, which stated that plaintiff was one of a group of progressive dealers, who sold "Armour Star bacon in the new window-top carton." Plaintiff's inducement was that he was a kosher meat dealer, and that the statement that he sold bacon was therefore, extremely injurious to his reputation. Both of these are memorandum opinions, and it is conceivable that special damages were too clearly alleged to merit mention by the court. If, however, these two holdings are what they appear to be, they are explainable only as sub silentio repudiations of the special damages requirement.

Kansas has avoided the injustice of the rule through a generous interpretation of what constitutes special damages. In *Karrigan v. Valentine*[54] the defendant published an announcement stating that plaintiff's wife had recently given birth to the couple's third child.

52. 236 N.Y. 581, 142 N.E. 292 (1923).
53. 254 N.Y. 514, 173 N.E. 845 (1930).
54. 184 Kan. 783, 339 P.2d 52 (1959).

The complaint alleged that plaintiff was in fact a bachelor and that the woman described as his wife was a lady of notorious ill-repute, who had given birth to several children out of wedlock. The damages alleged were a conglomeration of items ranging from mental anguish and a request for punitive damages to sixty cents for a phone call to an attorney. Forced to concede that the words were not libelous *per se*, the court avoided a harsh result by finding, "after long and careful study," that there was a sufficient allegation of special damages to satisfy the requirement for libel *per quod*.[55]

Instead of resorting to the indirections practiced by the New York and Kansas Courts, New Jersey took the sensible approach of repudiating the special damages rule when it appeared that its application would be unjust.[56] In analyzing the prior New Jersey decisions, the court discovered that the rule had never been a decisive factor in any case in which it was asserted. This same analysis is applicable to most of the decisions on the matter in other jurisdictions. The dogma that extrinsic circumstances will not be regarded in the absence of special damages is often repeated, but seldom applicable, and when it becomes applicable, most courts, like the New Jersey court, have been unwilling to let it work its injustice. Since the courts apparently do not like to apply the rule, and since its application is without logical justification, the course adopted by New Jersey would seem to be the most rational one. At any rate, it seems preferable to paying lip service to the doctrine, while consistently avoiding its application through subterfuge and equivocation.

The special damages rule has had its greatest effect in those jurisdictions which refuse to hold language libelous *per se* unless it is unambiguously defamatory. The courts have been less hesitant about applying this rule than they have about disregarding relevant extrinsic circumstances. In *Ruble v. Kirkland*[57] defendant published a statement that plaintiff had been made a defendant in both civil and criminal actions, and that the complaining party in these actions was alleging fraud and gross misrepresentation. The court found that this was susceptible of an innocent construction because: (1) there was no showing that the crime charged was one of moral turpitude (although the statement clearly specified fraud and gross misrepresentation); (2) the statement mentioned that the action was brought by an in-

55. In Koerner v. Lawler, 180 Kan 318, 304 P.2d 926 (1956), the special damages consisted in plaintiff's allegation that the libel was published for the purpose of injuring his reputation and his business. From this, the court deduced that plaintiff was alleging the actual occurrence of injury to his business, and permitted recovery, although no specific pecuniary loss was alleged.

56. "We . . . hold that it is not necessary to plead or prove special pecuniary damages . . . by mere reason of the fact that reference to extrinsic facts will be necessary to expose the defamatory impact . . . ." Herrmann v. Newark Morning Ledger Co., 48 N.J. Super. 420, 138 A.2d 61 (1958).

57. 125 Ore. 316, 266 Pac. 252 (1928).

dividual, making it doubtful whether it was a criminal proceeding at all (although the statement specified that both civil and criminal actions had been brought); and (3) there was no implication of guilt (although being made a defendant in such an action would, in itself, seem sufficiently injurious to reputation).

Perhaps the outstanding modern example of the innocent construction of obviously damaging language is that contained in the Illinois case of *Parmalee v. Hearst.*[58] The defendant newspaper published the information that plaintiff was one of the "wild people" associated with Henry Wallace, other persons associated with Wallace being described as "malignant communists." The writer further asserted that plaintiff had "wormed his way into government," and that he was the author of "depraved books" which were so "disgnsting" that he was "pinched." The court found that the term "wild people" was used as a genus, of which "strange company" and "malignant communists" were each species, and that, while plaintiff was described as belonging to the same genus as the "malignant communists," the description was not defamatory, because it differentiated him from that group by placing him in the "strange company" species. The other statements are analyzed less elaborately, the court apparently dismissing them as expressions of opinion.

These opinions, and others like them,[59] convey the impression that the court has decided against plaintiff from the outset, and is willing to go through whatever mental contortions are necessary in order to give its prejudice legal justification. In considering the basis for this attitude, the following factors seem relevant: (1) libel actions tend to be an outlet for the assertion of petty or unfounded claims;[60] (2) the pressure of libel litigation has undoubtedly increased over the last century, due to the multiplication of mass circulation newspapers, with their gossip columns and often controversial news stories;[61] (3) some courts seem to feel that a liberal attitude toward libel is an undesirable inhibition to freedom of expression.[62] Since

58. 341 Ill. App. 339, 93 N.E.2d 512 (1950).

59. Smith v. Los Angeles Bookbinders Union No. 63, 133 Cal. App. 486, 284 P.2d 194 (1955) (no recovery, although reasonable implication of statement was that plaintiff exploited his workers and that his equipment, workmanship and service were inferior to that of other bookbinders); Epton v. Vail, 2 Ill. App. 2d 287, 119 N.E.2d 410 (1954) (statement that plaintiff was "well-financed" in his political campaign by funds he obtained purportedly for another purpose); Tennessee Coal, Iron & R.R. Co. v. Kelly, 163 Ala. 348, 50 So. 1008 (1909) (statement that plaintiff had run people out of their homes given innocent construction on basis that it might have been done as a joke); Geisler v. Brown, 6 Neb. 254 (1877) (statement that plaintiff was inhuman and beat her step-child over the head with a club not libelous *per se* because it was not alleged that the beating was "wilful").

60. See, *e.g.*, cases cited in note 38, *supra.*

61. Note the number of cases cited in this note involving newspaper defendants, particularly among the more recent citations.

62. "The requirements for actionable libel are strict in the interests of pro-

the preliminary question of whether the language is capable of conveying a defamatory meaning is with the judge,[63] the practice of construing it innocently if possible is an effective means of keeping all but the most clear-cut claims from jury consideration. Thus, it seems plausible that pressure of petty litigation, which caused the application of *mitior sensu* to slander in an age when oral insult constituted the bulk of defamation cases[64] has also been the cause of its application to libel in an age when most of the litigation arises out of written communication. To courts which have adopted *mitior sensu*, the special damages rule has a substantial significance, and it seems doubtful whether many of them will repudiate it, so long as their attitude toward libel remains unchanged.

IV. CONCLUSIONS

The rule that special damages are necessary unless the defamatory sense of the language can be determined without reference to extrinsic circumstances cannot be justified on any logical basis. In the first place, its basic assumption that the gist of libel is pecuniary injury is repudiated by the better modern opinion.[65] In the second place, even though the assumption is accepted, it does not justify the rule. The rule is based upon the notion, applicable to other types of torts,[66] that pecuniary loss must be pleaded unless it follows necessarily from the injury.[67] To apply this notion to libel *per quod* is to beg the question as to what constitutes the injury in libel. It necessitates the assumption that the injury is determined only with reference to the words themselves, when, traditionally, and it would seem, logically, it has been determined with reference to the context in which the language was published. A third objection to the logic of the rule is that, instead of creating unity in the law of defamation, as presumably would have occurred had Townshend's analysis been strictly followed, this corruption of his theory compounds the disunity of defamation by placing the special damages requirement in libel and that in slander on completely unrelated bases.

The rule is unjust, in that it creates inequality among the standing of litigants. The injury may be as great where the defamation is

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tecting freedom of expression." Parmelee v. Hearst, 341 Ill. App. 339, 93 N.E.2d 512, 515 (1950).

63. Age-Herald Publishing Co. v. Waterman, 188 Ala. 272, 66 So. 16 (1913); PROSSER, TORTS § 92 and cases cited in n.15 (2d ed. 1955).

64. See notes 28 and 29 *supra*, and accompanying text.

65. See PROSSER, TORTS § 92 (2d ed. 1955); Green, *Relational Interests*, 31 ILL. L. REV. 35 (1936).

66. MCCORMICK, DAMAGES 32 (1935).

67. Almost all the cases continue to state this theory as the basis for the rule, although it would seem inapplicable in light of the current definition of libel *per se*.

latent as where it is patent.[68] The only possible arguments of making a distinction along this line are that in the former case the area of injurious impact is restricted to persons with knowledge of the extrinsic circumstances, and the injury is only as durable as the memories of those with such knowledge.[69] These arguments are undiscriminating. While in some cases the area of injurious impact will be smaller where the libel is latent, in many cases the area of *significant* impact may be identical. In such a case it is small consolation for a plaintiff shunned by his friends to learn that he has not been defamed in the eyes of strangers. It would seem more rational to adjust for varying injury in the assessment of damages, according to the circumstances of the individual case.

The continued repetition of the rule is unrealistic, since the courts apparently have no interest in applying it. Its assertion usually succeeds only in concealing the true basis of decision which is that the language is not defamatory,[70] or in forcing the court to strain unnaturally to reach a just result.[71] The courts should either apply the rule or discard it—preferably, the latter.

The rule has had some force where the language is construed in *mitior sensu,* and in these jurisdictions, it seems unlikely that it will be discarded. The *mitior sensu* construction restricts the right of recovery, but it at least has the saving grace of consistency. It is indiscriminately harsh upon all plaintiffs. While courts applying this construction tend to demand an unreasonably clear showing of a likelihood of injury, they have shown no more inclination to exclude relevant evidence of extrinsic circumstances than have the other courts. These courts would do much to clarify the issues if they adopted, in form as well as in practice, a rule that the language is to be given an innocent construction if it is reasonably susceptible of it in light of the circumstances surrounding its publication. Such a rule would be in line with the results of the opinions. Furthermore, it would be justified on the presumption-of-pecuniary-loss theory, since it would make the actionability of the language dependent upon its apparent capacity to injure. If the courts are determined to discourage libel litigation, it would seem preferable that they do so on this basis alone, rather than injecting the irrelevant distinction between patent and latent defamation.

Despite the eminent authority in support of the proposition that

68. *E.g.,* Karrigan v. Valentine, 184 Kan. 783, 339 P.2d 52 (1959); (see text *supra*); Smith v. Smith, 236 N.Y. 581, 142 N.E.2d 292 (1923) (see text *supra*).

69. There is a slight suggestion of such an argument in Tonini v. Cevasco, 114 Cal. 266, 46 Pac. 103 (1896). See also SMITH & PROSSER, CASES ON TORTS 1063 (2d ed. 1957).

70. See notes 38 and 42 *supra,* and accompanying text.

71. See notes 47-55 *supra,* and accompanying text.