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With Malice Toward One

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"Sticks and stones may break my bones, but words will never hurt me." There are very few of us who have not at some time very early in life heard that couplet. As children we suspected, or at least felt, that it really wasn't true; as adults we know that it is false. Words do indeed hurt, and they may hurt not only in ways that are obvious and measurable, but also in ways that are insidious and invidious.

It is not surprising therefore that the common law came to recognize that words—both written and spoken, but especially written—had the capacity to harm sufficiently that they could become actionable as a tort: the tort of defamation. For reasons which are quite literally clouded in legal antiquity, the tort of defamation became split into two separate torts, that of slander or the spoken word and that of libel or the written word. With the exception of but two states, Louisiana[1] and Washington,[2] this distinction still holds in the United States.[3]

This article will concern itself with the changing law of libel—one may perhaps more correctly say the declining law of libel. It will seek to give the New Mexico legal practitioner an overview of libel as seen under the common law, by the American Law Institute, by the New Mexico Supreme Court, and by the United States Supreme Court. In particular, consequences to New Mexico libel law as a result of the vigorous First Amendment attack on state libel laws by the United States Supreme Court will be indicated.

LIBEL UNDER THE COMMON LAW RULE

According to the common law,

> 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.[4]

Under this rule, any publication in the form of libel is actionable even though there are no special damages and even though extrinsic

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1. La. Civ. Code Ann., art. 2315 (West 1952).
2. Fitzgerald v. Hopkins, 70 Wash.2d 924, 425 P.2d 920 (1967).
3. Although the distinction has become quite cloudy with the advent of radio and television. Is a defamatory broadcast a libel or a slander? Both the courts and the statutory law are in disagreement.
4. Restatement of Torts § 569 (1938).

fact and innuendo may be necessary to supply the defamatory meaning.[5]

The common law rule continues to be the law in England today,[6] but there has been a very considerable controversy during the 1960's as to how many jurisdictions adhere to the rule within the United States. Writing in 1965, Eldredge claimed that 18 jurisdictions abided by the common law rule concerning libel but Prosser vigorously disputed this.[7] Eldredge lists the United States, Delaware, Georgia, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Texas, Washington, and Wisconsin as following the common law rule.[8] Prosser was originally willing to grant him only the United States Supreme Court, Delaware, Iowa, Minnesota, Mississippi, New Jersey, Wisconsin, and Texas,[9] but has since conceded New York and Oregon.[10]

THE VIEW OF THE AMERICAN LAW INSTITUTE

Because of their positions and reputations,[11] it was not surprising that the debate between Prosser and Eldredge concerning the common law rule spilled over into the deliberations of the American Law Institute (A.L.I.). What is surprising is the confusion it caused—with direct consequences to the law of libel in New Mexico.

The Restatement (First) of Torts in its section 569 adopted the common law rule.[12] During the formulation of the Restatement (Second) of Torts, however, a strong effort was made by Prosser, who was then the Reporter for Torts, to replace the common law rule of section 569 with a libel per se-libel per quod distinction.[13] Under his proposed distinction, a publication which does not carry its defamatory meaning, or innuendo, on its face, so that the meaning must be made out by pleading and proof of extrinsic facts, is

5. It frequently happens that a publication becomes libelous by reason of facts not apparent upon the face of the publication. Innuendo is the requirement that the extrinsic facts be understood in such a sense as to make the publication libelous. *See, e.g.*, W. Prosser, Law of Torts § 111, at 748, 749 (4th ed. 1971).

6. *Id.* § 112 at 762.

7. Eldredge, *The Spurious Rule of Libel Per Quod*, 79 Harv. L. Rev. 733, 747 (1965); *cf.* Prosser, *More Libel Per Quod*, 79 Harv. L. Rev. 1629 (1966).

8. 79 Harv. L. Rev., at 747, 748.

9. Prosser, *supra* note 5, § 107 at 782.

10. *Id.* § 112 at 763.

11. In 1966, Mr. Eldredge was an Advisor and former Revising Reporter for Torts and Mr. Prosser was the current Reporter for Torts of the American Law Institute.

12. Restatement, *supra* note 4, at § 569.

13. *See* Restatement (Second) Torts § 569 (Tent. Draft No. 11, 1965; Tent. Draft No. 12, 1966).

termed "libel per quod" and is not actionable without pleading and proof of special damages unless it falls within the specific categories of slander[14] which are actionable per se.[15] Prosser's position was strongly attacked by Eldredge, however, and the net result was that in 1965, a "present sentiment" vote of the Institute favored retention of the common law rule.[16]

In 1966, Prosser renewed the fight and once again sought to have the Institute adopt a libel per se-libel per quod distinction. The net result was a long and involved debate ending in what purported to be a compromise.[17] The compromise was an amendment to the common law rule so that it read:

> 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, *unless he knew or should have known of the extrinsic facts which are necessary to make the statement defamatory in its innuendo.*[18] (Emphasis supplied.)

The primary objection raised to this amendment was that there was no case law to back it up, and, as a consequence, the Institute in adopting it would be making law rather than restating or codifying it.[19] This should have been a telling argument against the amendment because it was based on the very philosophy on which the various restatements of the law were formulated. The proponents of the amendment took the position that although there was no language in any decision—aside from dictum in one California case—which directly supported the amendment, nonetheless it was what the courts really intended, and moreover it was the right thing to do.[20]

Remarkably enough, the amendment carried 69 to 58,[21] even though, as Eldredge was later to point out,[22] it made no sense! Apparently, this point finally became clear to the Institute also, for after a lunch break, Prosser indicated to the assemblage that the

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14. *See* note 40 *infra.*
15. *See* Restatement, *supra* note 13, at § 569, comment d.
16. *Id.* at Note to Institute.
17. 43 A.L.I. Proceedings 431-471 (1966).
18. *Id.* at 448.
19. *Id.* at 455, 456, and 463.
20. *Id.* at 457-459. The position of the proponents has also been explained as one in which they were simply reflecting what the courts of the land were holding but not saying. *See* Comment, *Torts—Libel in New Mexico—Reed v. Melnick,* 1 N.M. L. Rev. 615, 622 (1971).
21. A.L.I. Proceedings *supra* note 17 at 460.
22. Eldredge, *Variations on Libel Per Quod,* 25 Vand. L. Rev. 79, 80 (1972).

amendment "becomes extremely difficult in terms of wording, and I think the Reporter should attempt to draft another section and bring it back next year."[23] This seems to have been agreed upon, although no vote was taken.

In 1967, however, no new draft was presented to the Institute. Rather, Prosser, as Reporter, requested that the section be set at the foot of the Institute calendar to await further developments by the courts.[24] Nothing has transpired since with respect to section 569. It would thus appear that, insofar as the A.L.I. is concerned, the Restatement of Torts still follows the common law rule.[25]

LIBEL UNDER NEW MEXICO LAW

The purpose of the compromise position tentatively proposed by the A.L.I. in 1966 was to hold a publisher liable without special damages only if he knew or should have known of extrinsic facts which supplied the defamatory imputation to the publication.[26] As has been stated earlier, a major difficulty with this compromise was that there was no case law supporting it.[27] Nonetheless, in 1970 with the decision in *Reed v. Melnick*,[28] New Mexico became the first—and thus far the only—jurisdiction to accept the compromise position[29] when it adopted the following rule:

> 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; provided, however, that where the defamatory character of the writing can only be shown 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.[30]

The New Mexico Supreme Court was of the opinion that this rule adopted the old common law rule as stated in the Restatement of Torts together with the intended meaning of the amendment adopted at the 1966 A.L.I. meeting.[31] In taking this view, the court was

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23. A.L.I. Proceedings, *supra* note 17, at 462.
24. *See* Restatement, *supra* note 13 at Note to Institute (Tent. Draft No. 13, 1967).
25. Eldredge, *supra* note 22, at 82.
26. Prosser, *supra* note 6, at 764.
27. This may be one of the reasons why it has remained only a tentative proposal.
28. 81 N.M. 608, 471 P.2d 178 (1970).
29. Prosser, *supra* note 6; Eldredge, *supra* note 22, at 80.
30. 81 N.M. at 610.
31. *Id.*

apparently unaware that even Prosser, who was then the Reporter for Torts of the Institute, considered the amendment as merely a tentative proposal.[32] Further, the court went beyond the tentative Institute position in that this rule allows recovery in a situation not contemplated by the proposed amendment, namely, that of the innocent publisher of libel who causes special damages.[33] This situation arises when (a) a statement is published which is innocent on its face but when taken together with extrinsic facts becomes defamatory, (b) the publisher was unaware of the extrinsic facts that made the statement defamatory and could not reasonably have been aware of them, and (c) the statement results in special damages to the one who is defamed. Under these circumstances, the New Mexico rule renders the publisher liable, whereas it does not appear that any such intent can be derived from the words of the A.L.I. amendment.

To recover in an action for libel then, the plaintiff must either (1) plead and prove special damages, or (2) show that the publisher knew or should have known the necessary extrinsic facts in any action for latent libel, also known as libel per quod, or (3) plead and prove patent (or per se) libel, in which case no extrinsic facts are necessary.[34] This, of course, is a substantial change from the earlier libel per se-libel per quod distinction[35] which had been followed in New Mexico, especially in that per quod or latent libel no longer requires allegation and proof of special damages for recovery.

The decision in *Reed v. Melnick* does not indicate how libel is to be defined under the new rule. Of particular interest is the question of how libel per se is to be interpreted since it presumes damages and does not require a showing of knowledge of extrinsic facts. Under prior New Mexico case law, "any false and malicious writing published of another is libelous per se, when its tendency is to render him contemptible or ridiculous in public estimation, or expose him to public hatred or contempt, or to hinder virtuous men from associating with him."[36] Although this definition has been cited as lately as the Court of Appeals decision in *Reed v. Melnick,*[37] it is in reality more than 60 years old and was first cited in New Mexico in 1914.[38]

32. Prosser, *supra* note 6.

33. Eldredge, *supra* note 22, at 81.

34. 81 N.M. at 611.

35. For a discussion of this distinction and how it came to develop, *see* Comment, *Torts–Libel and Slander–The Libel Per Se-Libel Per Quod Distinction in New Mexico,* 4 Natural Resources J. 590 (1965).

36. *See, e.g.,* Thomas v. Frost, 79 N.M. 125, 127, 440 P.2d 800 (1968); McGaw v. Webster, 79 N.M. 104, 106, 440 P.2d 296 (1968); Chase v. New Mexico Pub. Co., 53 N.M. 145, 148, 203 P.2d 594 (1949).

37. 81 N.M. 14, 16, 462 P.2d 148 (1969).

38. Colbert v. Journal Pub. Co., 19 N.M. 156, 165, 142 P. 146 (1914).

There thus may be some question as to its validity under today's circumstances.[39]

In New Mexico there is also some question as to whether the four categories of slander per se, i.e., imputations of (1) a crime; (2) a loathsome disease; (3) unchastity in a woman; and (4) those adversely affecting plaintiff in his business, trade, profession, office, or calling, also constitute libel per se.[40] There has been no decision which has directly decided this point, although the New Mexico Supreme Court in *Reed v. Melnick* stated that the Court of Appeals in its decision on the same case held the four categories to be libel per se.[41] This statement appears to be in error. All that the Court of Appeals held was that the publication contained matter defamatory and of a prejudicial nature against plaintiff in relation to his business, did so without innuendo, and was libelous per se.[42] The holding said nothing about whether the four categories of slander per se were being adopted as also libelous per se.

Perhaps because of its assumption that the Court of Appeals had done so, the Supreme Court in *Reed v. Melnick* did not expressly hold that slander per se is also libel per se in New Mexico. As a practical matter, however, this would seem to be the clear import of its language. Further, it seems likely that libel per se extends well beyond the four categories of slander per se, since the court stated its recognition that "very serious harm may result from false imputations not included within the four. . . ."[43]

But regardless of whether the words may be construed on their face to be libelous or instead require extrinsic facts, how is the decision that they are in fact libelous to be made? The language of *Reed v. Melnick* is decidedly ambiguous on this subject and is probably correctly termed inconsistent.[44] First of all, the court states its agreement[45] with the following excerpt from *Martin v. Outboard Marine Corp.*[46]

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39. The following definition has also been used: "The term 'libel per se' is applied to words which are actionable because they are opprobrious in and of themselves without anything more." Rockafellow v. New Mexico State Tribune Co., 74 N.M. 652, 656, 397 P.2d 303 (1964); Hoeck v. Tiedebohl, 74 N.M. 146, 147, 391 P.2d 651 (1964); Stewart v. Ging, 64 N.M. 270, 273, 327 P.2d 333 (1958).

40. *See, e.g.*, the dissenting opinion of Justice Oman in Reed v. Melnick, 81 N.M. 14, 462 P.2d 148 (1969).

41. 81 N.M. at 609.

42. 81 N.M. at 16.

43. 81 N.M. at 610.

44. The inconsistency has been discussed in Comment, *Torts-Libel and Slander-Reed v. Melnick*, 1 N.M. L. Rev. 615 (1971).

45. 81 N.M. at 612.

46. 15 Wis.2d 452, 113 N.W.2d 135 (1962).

> ... After proof is in, the court may decide the communication is subject to one or more meanings, one being defamatory and the other innocent, or all defamatory. If the only possible meaning or meanings of the communication under all the facts in the case are defamatory as applied to the plaintiff and could only be reasonably so understood by the recipient, the court may hold the language defamatory as a matter of law and there is no question to go to the jury. If the court determines the communication is capable of an innocent meaning as well as a defamatory meaning, it is then for the jury to determine whether the communication capable of a defamatory meaning was so understood by its recipient.[47]

Agreement with this excerpt strongly suggests that henceforth in New Mexico, when a publication is capable of both an innocent and a defamatory meaning, it is up to the jury to decide whether the recipient understood it in its defamatory sense and thus whether it was libelous.

Unfortunately, in the very next sentence the court contradicts any such viewpoint by reaffirming the innocent meaning rule, stating that as first set forth in *Dillard v. Shattuck*[48] "a defamatory character will not be given the words 'unless this is their plain and obvious import,' and that the language will 'receive an innocent interpretation where fairly susceptible to it.' "[49]

Retention of the innocent meaning rule presents some substantial difficulties for the rule of libel ennunciated in *Reed v. Melnick*. For example, is the innocent meaning rule now applicable to both patent or per se libel and latent or per quod libel? This would seem to be the import of the court's language, although prior case law has applied the rule only to libel per se.[50] If so, then recovery for latent or per quod libel where the defamatory character of the writing must be shown by reference to extrinsic facts is effectively precluded. This follows from the fact that if reference to extrinsic facts is necessary, the publication on its face must per se be fairly susceptible to an innocent interpretation. This, of course, is contradictory to and renders meaningless a goodly portion of the rule of libel the court had just stated. The only way to avoid such a contradiction is to assume the intent of the court was to reaffirm the application of the innocent meaning rule only to libel per se. If this is indeed the case,

47. 113 N.W.2d at 140.
48. 36 N.M. 202, 11 P.2d 543 (1932).
49. 81 N.M. at 612.
50. *See, e.g.*, Thomas v. Frost, 79 N.M. 125, 127, 440 P.2d 800 (1968); McGaw v. Webster, 79 N.M. 104, 106, 440 P.2d 296 (1968); Rocafellow v. New Mexico State Tribune Co., 74 N.M. 652, 656, 397 P.2d 303 (1964); Hoeck v. Tiedebohl, 74 N.M. 146, 147, 391 P.2d 651 (1964); Del Rico Co. v. New Mexican, 56 N.M. 538, 548, 246 P.2d 206 (1952).

then future New Mexico libel actions may find the plaintiff in the unusual position of seeking to have the purported defamation treated as libel per quod to avoid possible application of the innocent meaning rule.

Secondly, even assuming the innocent meaning rule is applicable only to libel per se, its interpretation by the courts heretofore suggests that it will unduly restrict recovery even there. Thus, while the New Mexico Supreme Court states that the words will be given an innocent interpretation "if fairly susceptible to it," the prior decisions hold that if the words *can* have an innocent meaning, then they are not libelous per se. For example, in *Del Rico Co. v. New Mexican,*[51] the court stated:

> Furthermore, the statements claimed to be libelous, if such per se, must carry but a single meaning, and it an opprobrious or defamatory one. The language said to be libelous should be given its plain and natural meaning and be viewed by the court as other people reading it would ordinarily understand and give it meaning.[52]

This language has been cited with approval in subsequent cases,[53] with the appellate courts ignoring the inconsistency of viewing as the common folk do and yet requiring the publication to carry *only* a defamatory meaning in order to be libelous per se. The decisions clearly show that even though "other people" may view a publication capable of two meanings as libelous, the appellate courts have not done so.[54]

Thus although the holding in *Reed v. Melnick* was intended to remove New Mexico from the libel per se-libel per quod quagmire, retention of the innocent meaning rule indicates that the quagmire is deeper and stickier than even the New Mexico Supreme Court realized. What the intent of the New Mexico Supreme Court is, however, may well have been rendered largely irrelevant by recent decisions of the United States Supreme Court expanding the scope of the constitutional privilege against libel.

CONSTITUTIONAL PRIVILEGE

A series of cases[55] decided by the U.S. Supreme Court beginning in 1964 and continuing through 1971 have shown that Prosser was remarkably prescient in placing section 569 of the Restatement of

51. 56 N.M. 538, 246 P.2d 206 (1952).
52. 56 N.M. at 548.
53. *See* note 50 *supra.*
54. *See, e.g.,* Perea v. First State Bank, 84 N.M. 326, 503 P.2d 150 (1972); McGaw v. Webster, 79 N.M. 104, 440 P.2d 296 (1968).
55. 403 U.S. at 30 n. 1, 91 S.Ct. at 1813 n. 1.

Torts at the bottom of the A.L.I. calendar. These cases, in which the Court considered the limitations on state libel laws imposed by the constitutional guarantees of freedom of speech and of the press, have substantially gutted section 569 in both its original and compromise form[56] and have rendered almost all state libel laws–New Mexico's included–obsolete.

The assault on state libel laws began with the celebrated decision in *New York Times Co. v. Sullivan*[57] in which the Court first stated the rule that a public official may not recover damages "for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'–that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[58] In *Curtis Publishing Co. v. Butts*,[59] the Court extended the rule to public figures. Finally, in *Rosenbloom v. Metromedia, Inc.*[60] three Justices stated that "drawing a distinction between 'public' and 'private' figures makes no sense in terms of the First Amendment guarantees."[61] They then announced that "the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases."[62]

Rosenbloom is an unfortunate case in the sense that there was no clear cut majority opinion. Mr. Justice Brennan delivered one opinion concurred in by Chief Justice Burger and Justice Blackmun; Justices White and Black filed separate concurring opinions; Justices Marshall and Stewart joined in one dissenting opinion, while Justice Harlan filed yet another dissenting opinion; and Justice Douglas took no part. The plethora of views thus presented should nonetheless be carefully read by every attorney who may deal with a libel action, for *Rosenbloom* and the cases that preceded it present vast implications for state libel laws. What these are is perhaps best stated by Mr. Justice White who, writing for himself alone, summarized the views of at least five members of the Court as supporting the following rules:

> For public officers and public figures to recover for damage to their reputations for libelous falsehoods, they must prove either

56. For the effect of these cases on §569, see Keeton, *Some Implications of the Constitutional Privilege to Defame*, 25 Vand. L. Rev. 59 (1972).
57. 376 U.S. 254, 84 S.Ct. 710 (1964).
58. 376 U.S. at 279, 280, 84 S.Ct. at 726.
59. 388 U.S. 130, 87 S.Ct. 1975 (1967).
60. 403 U.S. 29, 91 S.Ct. 1811 (1971).
61. 403 U.S. at 45, 46, 91 S.Ct. at 1821.
62. 403 U.S. at 44, 45, 91 S.Ct. at 1820.

> knowing or reckless disregard of the truth. All other plaintiffs must prove at least negligent falsehood, but if the publication about them was in an area of legitimate public interest, then they too must prove deliberate or reckless error. In all actions for libel or slander, actual damages must be proved, and awards of punitive damages will be strictly limited.[63]

If this is indeed the viewpoint of a majority of the Supreme Court, then the rule of libel set forth in *Reed v. Melnick* is largely negated. Consider the requirement of "actual malice" as established by either knowing or reckless falsehood. Most civil litigation is decided on the basis of the "reasonable man" standard. If a preponderance of the evidence shows the defendant did not act as a reasonable man, i.e., was negligent, then the case is decided in favor of the plaintiff in the absence of some privilege. Not so here. The reasonable man standard is expressly rejected.[64] Rather, "reckless conduct is not measured by whether a reasonably prudent man would have published. . . . There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."[65] In most cases this places an overwhelming burden of proof on the plaintiff, and one he is incapable of sustaining.

The Court was well aware that "it may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity."[66] While this may result in libelous publications, a majority of the Court is of the opinion that "it is essential that the First Amendment protect some erroneous publications as well as true ones."[67] Their reasoning is based on the premise that to hold otherwise would result in the specter of self-censorship which is, per se, evil.[68]

Up to this point no mention has been made as to whether the First Amendment privilege applies to private individuals or only to the press, or the media as it is more often called of late. Most—but not all—of the libel cases considered by the Court since *New York Times* have involved actions against the media.[69] Although this point was

63. 403 U.S. at 59, 91 S.Ct. at 1827.
64. 403 U.S. at 50, 51, 91 S.Ct. at 1823; *see also* Monitor Patriot Co. v. Roy, 401 U.S. 265, 276, 91 S.Ct. 621, 627 (1971).
65. St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325 (1968).
66. 390 U.S. at 731, 88 S.Ct. at 1326.
67. 390 U.S. at 732, 88 S.Ct. at 1326.
68. *Id.*; *see also* Rosenbloom v. Metromedia, 403 U.S. 29, 50, 91 S.Ct. 1811 (1971).
69. For a brief listing of plaintiffs and defendants in these cases, see 403 U.S. at 30 n. 1, 91 S.Ct. at 1813 n. 1.

never expressly ruled on in *Rosenbloom,* which was an action against the operator of a radio station, there is reason to believe that the constitutional privilege does indeed apply to private individuals as well as the media. At least one commentator has drawn the conclusion from *Rosenbloom* that "constitutional protection extends to all reporting of events of public or general interest, not just media reporting."[70] This is certainly strongly intimated in the opinion of the plurality.[71] To take a contrary opinion would be to suggest that certain First Amendment rights are more important than others, i.e., freedom of the press is more crucial than freedom of speech.

Accordingly, it is now reasonable to assume that the "actual malice" burden is placed on any plaintiff about whom a publication is found to be in an area of legitimate public interest, regardless of whether the publication was by the media or a private individual. What then is an "area of legitimate public interest"? In *Rosenbloom,* the plurality, i.e., Justices Brennan and Blackmun and Chief Justice Burger, stated, albeit in an offhanded fashion, that at least certain parts of a person's activities may fall outside the area of general or public interest[72] and further that the courts are capable of identifying where privacy prevails and the public interest ends.[73] Beyond that, they declined to comment.

It may be that public interest will be equated with "newsworthy." The California courts have looked to such factors as the following to ascertain what is deemed newsworthy: (1) the social value of the facts published; (2) the depth of the article's intrusion into ostensibly private affairs; and (3) the extent to which the party voluntarily acceded to a position of public notoriety.[74]

With one exception, matters deemed private rather than of public interest do not seem as yet to have been delineated by the lower courts, state or federal. The exception, however, is an interesting one. Generally speaking, credit reports are held to be not of public interest, so that the "actual malice" rule does not apply to libel cases concerning them.[75] The U.S. Supreme Court has at least obliquely supported this point of view by denying certiorari to one case of this type after *Rosenbloom* was decided.[76]

Beyond the one credit report case, the Court has as yet had no

70. Keeton, *supra* note 56, at 63, 64.
71. 403 U.S. at 44, 45, 91 S.Ct. at 1820.
72. 403 U.S. at 44 n. 12, 91 S.Ct. at 1820 n. 12.
73. 403 U.S. at 48 n. 17, 91 S.Ct. at 1822 n. 17.
74. *See, e.g.,* Goldman v. Time, Inc., 336 F.Supp. 133, 138 (1971) and cases cited therein.
75. *See, e.g.,* Oberman v. Dunn & Bradstreet, Inc., 460 F.2d 1381 (7th Cir. 1972).
76. Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898, 92 S.Ct. 204 (1971).

"occasion to consider the impact of the First Amendment on the application of state libel laws to libels where no issue of general or public interest is involved."[77] It appears likely, however, that at least three of the Justices sitting when *Rosenbloom* was decided would uphold a constitutional right to privacy in this situation while at least three others would not.[78]

But even supposing that actual malice can in fact be proven in cases of general or public interest, how many plaintiffs can meet the further requirement, stated by Justice White, that actual damages must be proved *in all actions for libel or slander.* The New Mexico cases suggest that the answer is almost none. For example, during the two decades preceding *Reed v. Melnick,* when the libel per se-libel per quod distinction existed, no appellate case is presented wherein actual damages were proven for libel. This, of course, presumes that actual damages means "special damages" as used in the parlance of the New Mexico Courts. It should be borne in mind, moreover, that not all the Justices of the U.S. Supreme Court define "actual damage" in the same sense.[79]

WHERE DO WE GO FROM HERE?

As a result of the U.S. Supreme Court decisions culminating in *Rosenbloom,* libel law in New Mexico is presently perhaps best described as in a state of limbo. It may be that New Mexico libel law, representing to a substantial extent the proposed compromise position of the A.L.I., is affected to a lesser extent than is that of many other states by the First Amendment privilege set forth in *Rosenbloom* and its predecessor cases. But it is only a matter of degree. All state libel law is profoundly affected. As a practical matter, while recovery for libel may still be possible in certain restricted circumstances, the trend is toward the demise of libel as a tort.

77. 403 U.S. at 48, 49 n. 17, 91 S.Ct. at 1822 n. 17.

78. *Id.; see also* the dissenting opinion of Justice Douglas in Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898, 92 S.Ct. 204 (1971).

79. Keeton at least argues that the compromise position is affected to a lesser extent than are the common law rule or the position advocated by Prosser and could be more easily brought into line with the U.S. Supreme Court position. Keeton, *supra* note 56, at 74.