Chicago-Kent Law Review

Volume 33 | Issue 4 Article 3

September 1955

The Complaint in Libel and Slander: A Dilemma for Plaintiff

Joseph E. Wyse

THE COMPLAINT IN LIBEL AND SLANDER: A DILEMMA FOR PLAINTIFF

Joseph E. Wyse*

IF ANY BRANCH of the law may be open to the charge that form reigns supreme over substance, it must be said that the accusation would be an apt one to level against the law of libel and slander. It is not the writer's purpose to heap additional abuse upon an already well-criticized topic,[1] but rather to illustrate how an insistence upon formalized and stilted rules has imposed a burden upon the plaintiff in a defamation action which, in many worthy cases, could prove to be insuperable.

The interest protected and the remedy afforded by the law of libel and slander may be briefly summarized by saying that one whose reputation has been harmed by another's untrue and unprivileged accusation is entitled to recover from the defamer for the damage thereby suffered.[2] When attempting to recover such damages, however, the plaintiff is met with the initial task of preparing a complaint which would be adequate to set forth every element material to his case. While the preparation of a good complaint is an important step in every action, this task, in a suit for defamation, presents the most serious obstacle in the plaintiff's path to recovery. It is here that he will be con-

* J. D., DePaul University College of Law. Member, Illinois Bar; Assistant Professor of Law, DePaul University College of Law.

[1] The inconsistencies and downright absurdities to be found in the law of libel and slander have been criticized by Pollock, Prosser and others. See, for example, Prosser, Handbook of the Law of Torts (West Publishing Co., St. Paul, 1941), p. 777 et seq.

[2] One will not have proceeded very far along in the study of libel and slander law before he will meet the somewhat ambiguous word "defamation." Digests and legal encyclopedias generally classify material in this field under the heading of Libel and Slander, principally because this is the verbiage used by the courts. Contemporary textbook and casebook authors, however, generally introduce the material as a discussion of the law of Defamation. Apparently, "defamation" is a generic term designed to signify any invasion of reputation without indicating how the invasion was achieved. The terms "libel" and "slander," on the other hand, connote invasions of reputation brought about by writing or the like and by speaking, respectively.

fronted with pleading requirements of such arbitrary and technical nature as to make the work of framing a complaint capable of withstanding a motion to strike or dismiss the suit[3] a most ticklish and difficult responsibility. The material which follows is a paragraph-by-paragraph analysis of such a complaint, offered with the hope of spotlighting the pitfalls which are certain to trap the unwary.[4]

As a preliminary matter, it is important to distinguish libel from slander, for the necessary allegations will vary slightly depending on the method used to defame. Historically, the term "libel" has been used to signify a written, printed, or similar form of defamation,[5] while "slander" has referred to an oral defamation.[6] Since writing had more permanence than oral communication, had a potentially greater circulation and was thought the more likely to be believed, a cause of action for libel was formerly, and is to a lesser degree today, more favored than one for slander,[7] although neither has received any marked degree of favorable treatment at the hands of courts. With the advent of modern and more subtle means of communication, such as motion pictures, radio and television broadcasting, courts have been presented with vexing problems of classification. Instead of treating these problems as being *sui generis,* the courts have endeavored to rationalize doubtful issues arising from defamation proceeding over these newer vehicles of communication by resort to older tests.[8] The pleader must, therefore, resolve his doubts

[3] Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 169, authorizes the use of a motion where, under the older practice, a demurrer would have been appropriate.

[4] For reasons of clarity rather than brevity, important defensive problems with respect to matters of privilege, truth and mitigation of damages are not discussed herein in detail.

[5] Actually, the term is quite broad, having been enlarged to include defamation through the medium of such things as pictures, signs, statues, hanging in effigy. etc. See Prosser, op. cit., pp. 794-5.

[6] Prosser, op. cit., p. 794.

[7] Kelly v. Hoffman, 137 N. J. L. 695, 61 A. (2d) 143, 5 A. L. R. (2d) 951 (1948).

[8] See Current Trends in State Legislation (University of Michigan Law School, Ann Arbor, 1952), p. 4, and note in 25 CHICAGO-KENT LAW REVIEW 142-9. But see Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A. (2d) 302, 124 A. L. R. 968 (1939), where liability of a broadcasting company for an "ad lib" radio remark was said to rest upon a showing of negligence. See also Kelly v. Hoffman, 137 N. J. L. 695, 61 A. (2d) 143, 5 A. L. R. (2d) 951 (1948), where radio

in this regard before undertaking the vexatious task of preparing the complaint.

Turning now to the complaint, the eminent Mr. Chitty once said that "a declaration must allege all the circumstances necessary to support the action and contain a full, regular and methodical statement of the injury which the plaintiff has sustained."[9] After substituting the word "complaint" for the term "declaration," and after having made due allowance for those changes produced by modern procedural methods,[10] his summarization forms an excellent place from which to begin this discussion, since it emphasizes that regard must be had both for the facts, that is the matter to be stated, and for the mode of expression, *i.e.*, the manner of alleging those facts. So far as the matter to be pleaded is concerned, every fact or circumstance which would be necessary to entitle the plaintiff to recover ought to be disclosed since the plaintiff would have no case, were all or any one of these absent. But even if all the necessary facts were presented, the bare statement thereof might still be inadequate since the assembled materials must be articulated in the appropriate legal jargon, with enough factual detail to avoid the criticism that the pleader had charged no more than his conclusions.

In that connection, a complaint in defamation would probably divide into two, or possibly three, distinct parts, each differing in character and function but within which the several elements of the cause of action would be made to appear. These three main divisions would deal with matters of inducement, with the gravamen or gist of the complaint, and where necessary, with

---

broadcasting was likened to dissemination by a bookseller or by the proprietor of a news-stand, the latter being liable only for negligence. Defamation by means of motion pictures was classed as libel in Brown v. Paramount Publix Corp., 240 App. Div. 520, 270 N. Y. S. 544 (1934), and Youssopoff v. Metro-Goldwyn-Mayer, 50 Times L. R. 581, 99 A. L. R. 864 (England, 1934). By contrast, liability for the remarks of a guest panelist on a television show was said, in Remington v. Bentley, 88 F. Supp. 166 (1949), to be governed by the law of slander.

[9] Chitty, Pleading, 13th Am. Ed., Vol. 1, p. 255.

[10] Despite abolition of the names and other formal requisites of the older remedies, Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 155, still provides that "this section shall not be deemed to affect in any way the substantial averments of fact necessary" to state any cause of action.

matters offered by way of aggravation. In some tort complaints, the first of these divisions would be unnecessary since the mere statement of the acts performed by the defendant would be enough to disclose a case[11] but, in other and more complicated statements, acts not intrinsically injurious may become so only by reason of particular circumstances. In such instances, the facts extrinsic to the actual wrong, but which are needed to render it a wrong and to develop its wrongfulness, must be pleaded and are usually offered by way of introduction or inducement.[12] As this is likely to be true of complaints based on defamation, particularly in those instances where the defamatory effect is not produced by the bare words used but results from the circumstances in which the words were used, the complaint, after the customary opening paragraph which serves to identify the plaintiff and the defendant,[13] should proceed with these introductory matters.

Among the items invariably mentioned in this part of the complaint is the fact that the plaintiff was and always had been a person of good name, credit and reputation in the community.[14] Sometimes there is added the further statement that this good reputation was well deserved[15] Neither of these allegations is traversable[16] and the plaintiff is not initially required to offer

[11] Thus, in a complaint based on assault and battery, the simple statement that the defendant "beat and struck the plaintiff" would suffice since, from that simple allegation, all other pertinent elements, such as the fact that the plaintiff was a human being and enjoyed a right of bodily security, would be inferred.

[12] Thus, where incontinence is not criminal unless one of the parties was married, a speech imputing such indiscretion to the plaintiff would not be actionable unless it had first been alleged that the plaintiff, or the plaintiff's paramour, was a married person: Pollard v. Lyon, 91 U. S. 225, 23 L. Ed. 308 (1876).

[13] See forms of introduction set out in Ill. Civ. Prac. Act Anno. (1933), pp. 16-7.

[14] Form No. 30, a complaint for slander upon words actionable *per se*, appearing in Ill. Civ. Prac. Act Anno. (1933), appendix p. 34, omits this allegation. But compare with Form No. 31, for a slander imputing dishonesty to a lawyer in relation to his professional activities, which includes the statement that the plaintiff "enjoyed a reputation for honesty, integrity and skill in his profession."

[15] These twin allegations of good reputation and the merit thereof point up another verbal distinction often blurred in the cases. The law of libel and slander protects reputation, that is, the opinion which others have of the plaintiff. This is made clear by the requirement that, to be actionable, the accusation must have been communicated to someone other than the plaintiff. See note 21, post. Nevertheless, Newell, Slander and Libel (1924), 4th Ed. § 8, speaks of imputations affecting the plaintiff's character. It should be borne in mind that the word character, as there used, is synonymous with reputation.

[16] Newell, op. cit., § 523.

proof to sustain them.[17] The omission of these allegations would probably be a matter of little consequence. Good practice, however, would dictate their use if for no other reason than to emphasize the fact that it is the purpose of this branch of the law to protect reputation.

If the defamatory matter names the plaintiff by his proper name and contains other identifying characteristics by which it can be seen that the same refers to, and only to, the plaintiff, no further matter of inducement would be needed. It could happen that the defamatory remark, while intended to cast opprobrium on the plaintiff, did so in some veiled fashion. This might be done by the use of some descriptive term designed to refer to the plaintiff without naming him by his true name[18] or by attributing acts to him which, on the basis of the words used, would superficially appear to be of innocuous character.[19] In that event, a carefully worded introduction by way of inducement would be essential as a predicate to the second portion of the complaint.

The bulk of the complaint for defamation will consist of the gravamen of the charge. Here it will be necessary to charge, in positive fashion, that the defendant did (1) with malice, (2) utter a defamatory remark, set forth in verbatim fashion, (3) of and concerning the plaintiff[20] (4) in the presence of divers other per-

[17] In an action for defamation, the plaintiff's reputation, as an individual at least, is presumed to be good: Hahnemannian Life Ins. Co. v. Beebe, 48 Ill. 87 (1868); 53 C. J. S., Libel and Slander, § 210, p. 317. The plaintiff may offer evidence on the point only after his reputation has been attacked by the defendant in an effort to mitigate damages: Harbison v. Shook, 41 Ill. 141 (1866).

[18] In Steele v. Southwick, 9 Johnson 214 (New York, 1812), for example, the alleged defamatory statement was: "The man at the sign of the Bible is no slouch at swearing to an old story." By way of inducement, the plaintiff alleged that he was a bookseller and had a business sign on his premises in the image of a book on which appeared the word Bible. On demurrer, the allegation was held to be sufficient.

[19] In the illustration last mentioned, the statement that the plaintiff was no slouch at "swearing to an old story" possessed no particular significance until linked up with the fact that the plaintiff had recently been a witness in another case, from which an innuendo might be drawn that the plaintiff had there committed perjury. Reference to this prior testimony by way of inducement would be essential to state a case.

[20] Not emphasized is the requirement that the defendant must have been speaking or writing of and concerning the plaintiff. Usually, the defendant's words will manifestly refer to the plaintiff. If this is not so, a simple allegation, called a colloquium, to the effect that defendant published the matter "of and concerning the plaintiff" would suffice: Chitty, Pleading, 13th Am. Ed., Vo. 1, pp. 403-4.

sons,[21] (5) which charge was false, but which (6) was calculated to produce a particular effect in the minds of those who heard or saw it. Where necessary, the gravamen should also reveal the necessary facts to show compliance with venue requirements.[22] Enlargement upon these several points follows hereafter.

As to the first, a vital allegation, the plaintiff is usually required to do no more than characterize the defamatory remark as having been "maliciously" spoken or published[23] since, to do more, might require the pleading of evidentiary facts and would result in an unnecessary extension of the complaint.[24] But much confusion has arisen about the part which malice plays in the modern law on the subject. Many old cases contain the statement that malice is the gist of the action for libel or slander; which phrase is also occasionally found in recent cases. The statement was literally true in the early days when libel and slander were emerging as separate torts.[25] Today, however, it is distinctly untrue in any material sense for two reasons. In the first place, the plaintiff has the benefit of a presumption that the defamatory statement made about him was uttered maliciously, which presumption is not rebuttable unless the defendant shows that he had a privilege to publish the matter.[26] This presumption is no more than

21 No emphasis has been placed, in this article, on the element of publication. Of course, the plaintiff's complaint would be defective unless it appeared from an examination thereof that the defendant's accusation was communicated to someone other than the plaintiff: Chaloupka v. Lacina, 301 Ill. App. 173, 21 N. E. (2d) 909 (1939); Wiese v. Meissner, 171 Ill. App. 597 (1912). The fact of publication is usually evident from the surrounding circumstances, as where the statement appeared in a newspaper. If this is not so, the element of publication would probably be satisfied by an allegation as simple as that noted: Edmunds, Illinois Civil Practice Forms (Callaghan & Co., Chicago, 1933), Vol. 2, p. 1103. The defendant may apply for a bill of particulars in order to learn who these "divers other persons" were. If so, one would have to be furnished, where possible, under penalty of dismissal of the suit if not forthcoming: American Rolling Mill Corp. v. Ohio Iron & Metal Co., 120 Ill. App. 614 (1905).

22 See, in particular, Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, §§ 131 and 131a.

23 As to the meaning of this term, see post, notes 26 to 28.

24 In Forms 30 and 31, Ill. Civ. Prac. Act Anno. (1933), appendix p. 34, the phrase appears as "the defendant maliciously spoke of the plaintiff." A more extended form of expression appears in Keigwin, Common Law Pleading (Lawyers Co-operative Publishing Co., Rochester, 1934), 2d Ed., p. 325.

25 Prosser, op. cit., p. 815.

26 Gilmer v. Eubank, 13 Ill. 271 (1851); Newell, op. cit., § 526; 53 C. J. S., Libel and Slander, §§ 76-8, pp. 125-7.

a pure fiction designed to obscure the fact that malice, in the sense of ill will or spite, is no longer a vital part of the plaintiff's case, at least in the first instance.[27] Secondly, it has now been reasonably well established that libel and slander are torts of strict liability.[28] It seems clear, therefore, that the defendant's state of mind is immaterial, at least in the absence of a claim of privilege, which claim could not be advanced until after the plaintiff's complaint had been filed.[29] But, in view of the conflicting and confusing statements about malice to be found in the cases, it would be folly to omit an allegation with respect to malice from the complaint.

Much care must be exercised in setting forth the second essential allegation, which has to do with the text of the disparagement directed against the plaintiff. At this place, the plaintiff will be obliged to set forth, in verbatim form and between quotation marks, the exact words uttered by the defendant which are claimed to be defamatory.[30] Not only is the allegation essential but strict proof thereof will be required at the trial.[31] To avoid the possibility of variance, particularly since fallible human beings seldom hear alike or remember things evenly, the defamatory matter,

[27] Prosser, op. cit., pp. 815-6. This statement may have to be limited to cases where the words used are actionable *per se*, since cases found in Illinois, as well as in other jurisdictions, are replete with statements to the effect that, where the defendant's charge is not actionable *per se*, the plaintiff must plead and prove actual malice: Tiernan v. East Shore Newspapers, Inc., 1 Ill. App. (2d) 150, 116 N. E. (2d) 896 (1953); Cook v. East Shore Newspapers, Inc., 327 Ill. App. 559, 64 N. E. (2d) 751 (1954). See also Newell, op. cit., § 675; 53 C. J. S., Libel and Slander, § 78, p. 127. The difficulty, as will be demonstrated later, lies in determining what is meant by the phrase "actionable *per se*."

[28] Prosser, op. cit., p. 816 et seq.

[29] Two other matters might inject the defendant's mental state into the controversy. While truth was a complete defense at common law according to the case of Tilton v. Maley, 186 Ill. App. 307 (1914), many jurisdictions now permit truth as a defense only if the defendant has acted with good motives and for justifiable ends. Illinois is numbered among the latter: Ill. Const. 1870, Art. II, § 4; Cook v. East Shore Newspapers, Inc., 327 Ill. App. 559, 64 N. E. (2d) 751 (1945). In addition, the lack of actual malice may be shown by defendant in mitigation of damages: Tottleben v. Blankenship, 58 Ill. App. 47 (1894); 53 C. J. S., Libel and Slander, § 252, p. 369.

[30] Brown v. Glickstein, 347 Ill. App. 486, 107 N. E. (2d) 267 (1952); Chitty, op. cit., Vol. 1, p. 404.

[31] See, for example, the cases of Wilborn v. Odell, 29 Ill. 456 (1862), and Sanford v. Gaddis, 15 Ill. 229 (1853).

if orally uttered, should be stated in a variety of ways.[32] The task of pleading the exact words uttered is, however, not difficult where, as is true today in most suits charging defamation, the matter has appeared in print.[33]

It must, of course, appear to the court that the words so set forth are reasonably susceptible of a defamatory meaning[34] for, if they are not, the complaint will be bad and will be dismissed. It is over this question, and the question as to whether or not the damages have been well pleaded, that the courts have been most rigid and strict. Since these two problems are inseparably linked together, they will be discussed but once. Inasmuch as neither courts nor law will be concerned with trifles, a defamatory communication, to be actionable, must represent a serious imputation. It was well-established law several hundred years ago, and is still the law today, that only special damages—meaning a loss readily measurable in monetary terms—can be recovered for a slander.[35] If, however, the slanderous remark fell into one or more of certain limited categories, known as slanders *per se,* general damages would be presumed.[36]

The importance of these rules becomes striking if one ap-

32 One count should be enough, with the varied allegations being set forth in much the same way as is true of the several acts or omissions charged in a negligence action: Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, §259.12. If confusion would be generated, separate counts could be used.

33 There is some doubt whether Section 36 of the Illinois Civil Practice Act, relating to exhibits, would be applicable. If the term "written instrument," as used therein, extends to more than contractual instruments, then the printed defamatory matter would meet the description, permitting the attachment of a reproduction of the defamatory matter as an exhibit, since the action would be founded thereon. In any event, under Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 169, the text could be recited in *haec verba* in the body of the complaint.

34 Ogren v. Rockford Star Printing Co., 288 Ill. 405, 123 N. E. 587 (1919); Lodge v. Hampton, 116 Ill. App. 414 (1904); Restatement, Torts, Vol. 3, § 614.

35 Wright v. F. W. Woolworth Co., 281 Ill. App. 495 (1935); Newell, op. cit., §721.

36 The categories of slander *per se* at common law, still applicable today unless changed by statute, were: (1) words imputing the commission of a criminal offense; (2) words that imputed affliction with some contagious disease, where the accusation, if true, would exclude the plaintiff from society; (3) words which impute unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such office or employment; (4) words which prejudice the plaintiff in his profession or trade: Wright v. F. W. Woolworth Co., 281 Ill. App. 495 (1935). To this list should be added: (5) words charging fornication or adultery; and (6) words charging one with false swearing, both of which have been made actionable in Illinois by statute: Ill. Rev. Stat. 1953, Vol. 2, Ch. 126, §§ 1-2.

preciates the fact that only rarely does a defamatory imputation occasion a money loss. In fact, it has been said by one text writer that the task of proving special damages in libel and slander cases is one of the most difficult in law.[37] Practically speaking, therefore, to require a plaintiff to plead and prove special damage is to deal a death blow to his cause of action in most cases. On the other hand, where libel was involved, the courts dealing with the early cases were most liberal, holding that, from the publication of a libel, general damages would be presumed to flow.[38] The effect was to allow plaintiffs, in such cases, to recover substantial amounts from defendants without being obliged to show, and often without having been forced to suffer, so much as a single penny of out-of-pocket loss. It was not to be expected that such benevolence would long prevail but, as is so often the case with cures, the remedy left the law of libel in a far more confused and rigid state than it had originally been.

The first innovation attempted by the courts was to adapt to libel cases the phraseology and reasoning of slander law. During the nineteenth century there began to appear, in libel decisions, the concept of "libel *per se,*" a phrase so similar to "slander *per se*" as to suggest a conscious turning to slander law for the terminology. It appears that the courts first used this term to signify a libel which was most serious in character and would almost certainly cause damage to reputation. From such serious accusations, therefore, general damages were presumed to flow.[39]

37 Morris, Torts (The Foundation Press, Inc., Brooklyn, 1953), p. 290.

38 McCormick, Handbook on the Law of Damages (West Publishing Co., St. Paul, 1935), p. 416. The same rule has been announced in Illinois for imputations which could be said to be libelous *per se* but, as to libels not falling within this category, referred to as libels *per quod*, pleading and proof of special damages is still necessary: Cook v. East Shore Newspapers, Inc., 327 Ill. App. 559, 64 N. E. (2d) 751 (1945). Note, however, that the phrase "libelous *per se*" is fraught with ambiguity, as will appear later herein. It is vitally important to distinguish the task of proving special damages from that of proving general damages. In the former, plaintiff must show wherein he has suffered an actual loss of money, by allegation and proof that, for example, he lost a job, a profitable business, or the like; specifying when, where, and to what extent the loss was suffered. Where general damages are presumed, the jury is free to return a sizable verdict on the simple assumption that the plaintiff's reputation must have suffered: McCormick, op. cit., p. 421 et seq.

39 That courts, at times, have used the term libel *per se* to indicate a charge most serious in nature, as contrasted with charges of less serious import, see Isham, "Libel Per Se and Libel Per Quod in Ohio," 15 Ohio L. J. 303 (1954), and McCor-

In the case of other and less serious libels, referred to as libels *per quod,* special damages had to be pleaded and proved before recovery could be had.

At this stage of development, the law of libel could have merged with the law of slander because discrepancies between the two were fast disappearing. All that remained to accomplish that result was for the courts to define libel *per se* by reference to the categories previously established for slander *per se.* At least one court has done just that,[40] but the overwhelming attitude of the courts is that an imputation may be actionable *per se* if made in writing, while the same charge, uttered orally, would require a showing of special damage to permit recovery.[41] A glance at any list of imputations which have been held to be libels *per se,* however, will show that most of them would have been slanders *per se* if made orally. It is, therefore, clear that a convenient rule-of-thumb to determine whether or not a particular charge is a libel *per se* would be to see if it would be a slander *per se* had it been orally uttered.

Since the category known as libel *per se* is not as narrow and confined as slander *per se,* it might well be asked what is the ultimate criterion of libel *per se?* Bearing in mind that the early English and American cases, as well as text writers, had on many occasions defined the term "libel,"[42] it might have been expected

---

mick, op. cit., p. 417, note 6. It is the opinion of the writer that Illinois has, in the past, and probably still does today use the term libel *per se* in the sense indicated herein. The phrase itself probably first appeared in the case of Brown v. Burnett, 10 Ill. App. 279 (1881). It was not used in its secondary sense, as designed to indicate a charge the defamatory meaning of which appears entirely on the face of the words, until the decision in LaGrange Press v. Citizen Pub. Co., 252 Ill. App. 482 (1929), cert. den. 256 Ill. App. xlviii.

40 Hudson v. Slack Furniture Co., 318 Ill. App. 15, 47 N. E. (2d) 502 (1943).

41 Holtz v. Alton Telegraph Printing Co., 324 Ill. App. 1, 57 N. E. (2d) 137 (1944); Wright v. F. W. Woolworth Co., 281 Ill. App. 495 (1935); White v. Borquin, 204 Ill. App. 83 (1917); 53 C. J. S., Libel and Slander, § 8, p. 45.

42 The definition framed by Newell in 1898 would appear to be representative. He wrote that "any publication, expressed either by printing or writing or by signs, pictures or effigies or the like, which tends to injure one's reputation in the common estimation of mankind, to throw contumely, shame or disgrace upon him, or which tends to hold him up to scorn, ridicule or contempt, or which is calculated to render him infamous, odious or ridiculous, is *prima facie* a libel, and implies malice in its publication. So, also, is any publication injurious to private character, or that reflects upon his character, or that injures social character, or that induces an ill opinion, or that imputes a bad reputation; and so with all defamatory words injurious in their nature." Newell, Libel and Slander (1898), 2d Ed., § 3.

that these courts which adopted the notion of libel *per se* would promulgate their own nomenclature. This has not been the case, however, so the older definitions are still quoted for this purpose.[43] One interesting feature of the problem, though, is the frequency with which statutes defining the criminal offense of libel are cited as determining the limits of libel *per se* for civil purposes. Thus, the section of the Illinois Criminal Code on the point[44] has been repeatedly referred to[45] even though there may be some reason to question the propriety of applying, in civil actions, a legislative standard enacted for criminal prosecutions.[46] It might be said, however, that the practice has been followed for too long a time to cause much concern and, in addition, the statutory definition is probably not materially different from the standard evolved by judges and text writers.[47]

Another, but by no means identical, use of the term libel *per se* has crept into the law of many American jurisdictions in the form of a rule of pleading. Thus, it has often been said that, to be a libel *per se,* it is not enough that the charge be of a sufficiently serious nature but, in addition, the plaintiff has the burden of establishing the defamatory meaning by reference to the words alone, unaided by extrinsic circumstances.[48] No better exposition

[43] The case of Cobbs v. The Chicago Defender, 308 Ill. App. 55, 31 N. E. (2d) 323 (1941), relies upon the definition of libel provided by Newell. In Davis v. Ferguson, 246 Ill. App. 318 (1927), the court drew upon definitions of libel *per se* to be found in Corpus Juris and Townshend, Libel and Slander.

[44] Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 402, states: "A libel is a malicious defamation, expressed either by printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, ridicule, or financial injury." See also Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 404.1, et seq., for the offense defined as libel by radio.

[45] Spanel v. Pegler, 160 F. (2d) 619, 171 A. L. R. 699 (1947); Ogren v. Rockford Star Printing Co., 288 Ill. 405, 123 N. E. 587 (1919); Cook v. East Shore Newspapers, Inc., 327 Ill. App. 559, 64 N. E. (2d) 751 (1945); Burns v. Hicks, 242 Ill. App. 198 (1926).

[46] In that respect, see Thayer, "Public Wrong and Private Action," 27 Harv. L. Rev. 317 (1914).

[47] Compare, for this purpose, the statutory definition as to criminal libel contained in note 44, ante, with the definition as to civil libel appearing in note 42, ante.

[48] Prosser, op. cit., p. 798, note 61, indicates that the states of Kansas, Kentucky, Oklahoma, Montana and North Dakota have adopted this rule. To the list of cases from these jurisdictions, the following may be added: Harrison v. Burger, 212 Ala. 670, 103 So. 842, 25 A. L. R. 1148 (1925); Ilitzky v. Goodman, 57 Ariz. 216, 112 P.

of the problem can be found than that offered in the Arizona case of *Ilitsky* v. *Goodman*[49] where the court said:

> The question is whether the letters above referred to were libelous. Written communications which are claimed to be libelous fall into one of three classes: (a) those which on their face and without the aid of any extrinsic matter come within the definition above set forth, (b) those which on their face do not fall within the definition but which by reason of special circumstances actually do, and (c) those which even though aided by the surrounding circumstances cannot reasonably be held to fall within it.
>
> Class (a) is called "libelous per se" because it needs no allegation or existence of extraneous surrounding circumstances to make it such. Communications of this kind are assumed to cause damage, and no special damages need be alleged. Class (b) comprises those statements which on their face are not libelous but by reason of certain surrounding circumstances are actually such. These circumstances may be such as are known to the general public or are known only to the persons to whom the communication is published, but in either case in a complaint for libel they must be followed by what is commonly called a colloquium or innuendo setting forth both the extraneous circumstances and the reason why under such circumstances the communication, otherwise innocent, becomes libelous. In this case no damages are presumed, but they must be specially alleged and proved. Class (c) comprises those communications which are not only innocent on their face, but have no attendant circumstances which would render them libelous.[50]

(2d) 860 (1941); Peabody v. Barham, 52 Cal. App. (2d) 581, 126 P. (2d) 668 (1942); Dalton v. Woodward, 134 Neb. 915, 280 N. W. 215 (1938); Cardiff v. Brooklyn Eagle, Inc., 190 Misc. 730, 75 N. Y. S. (2d) 222 (1947); Whitaker v. Sherbrook Distrib. Co., 189 S. C. 243, 200 S. E. 848 (1939); Denney v. Northwestern Credit Ass'n, 55 Wash. 331, 104 P. 769, 25 L. R. A. (N. S.) 1021 (1909). The rule stated in the text and approved by the courts noted above constitutes a departure from the common law of libel, which treated all libels as actionable without pleading or proof of special damages: McCormick, op. cit., p. 416; Prosser, op. cit., p. 798.

[49] 57 Ariz. 216, 112 P. (2d) 860 (1941).

[50] 57 Ariz. 216 at 218, 112 P. (2d) 860 at 862. The court continued: "We may illustrate the difference as follows. A writes a letter to B, stating 'X murdered Y.'

These distinctions may be important for it is possible that Illinois could well be the next state to embrace, with all its harshness, the oppressive doctrine so enunciated.

In the recent case of *Brewer* v. *Hearst Publishing Company*,[51] the Court of Appeals for the Seventh Circuit was called upon to apply relevant Illinois law in deciding whether the lower court had acted correctly in dismissing a complaint charging libel. The court there said that to "determine whether or not the published article is libelous *per se*, we must view it stripped of all innuendo, colloquium or extrinsic or explanatory circumstances; if the words are unambiguous and incapable of an innocent meaning they may be declared libelous as a matter of law."[52] It would probably be useless to point out that the cases cited in support of the foregoing quotation do not stand for the rule enunciated, since identical language can be found in at least one Illinois Appellate Court decision not even mentioned by the Court of Appeals.[53]

To grasp the real import of the rule so stated, it now becomes necessary to define the words "inducement," "colloquium," and "innuendo."[54] The first of these terms has already been discussed and refers to the pleading of extrinsic circumstances which serve to explain the sense in which the apparently innocent words were

---

This letter, if untrue, is libelous on its face, for it specifically accuses X of a crime, and would be understood by all persons to do so. An illustration of (b) is a letter in which A says to B, 'X was the only person who was present at the home of Y on May 1 between the hours of six and nine.' On its face this is a perfectly innocent and harmless statement. If, however, B knows that Y came to his death under circumstances which show that he must have been murdered by some one in his home between the hours above stated, the statement is libelous because B reasonably understands the letter as meaning that X must have been the one who murdered Y. An illustration of (c) is where A writes to B the same letter as set forth in the previous example, but Y has not been murdered nor harmed, nor has any untoward incident occurred in regard to him at the time mentioned. The test, as can be seen in each case, is what, under the circumstances as known to B, would the latter have understood the letter to mean."

51 185 F. (2d) 846 (1950).

52 185 F. (2d) 846 at 850, citing Dowie v. Priddle, 216 Ill. 553, 75 N. E. 243 (1905), and Life Printing & Publishing Co. v. Field, 324 Ill. App. 254, 58 N. E. (2d) 307 (1944).

53 The case of LaGrange Press v. Citizen Pub. Co., 252 Ill. App. 482 (1929), cert. den. 256 Ill. App. xlviii, contains almost identical language as that quoted.

54 An excellent exposition of the use of allegations with respect to inducement, colloquium and innuendo may be found in the case of People v. Spielman, 318 Ill. 482, 149 N. E. 466 (1925). While the case involved a criminal libel, the court relied for support on Newell's discussion of the subject drawn from civil cases.

used.[55] The second refers simply to the allegation, short yet essential, that the defamatory statement was made of and concerning the plaintiff and, where an inducement has been used, that the words were uttered of and concerning the matter pleaded by way of inducement.[56] The third term requires explanation.

An innuendo is, as its lay meaning would indicate, an interpretation or explanation of the meaning to be given to the words published by the defendant. An innuendo is probably essential where words are defamatory only because of extrinsic circumstances, its office being to relate the two so that the court may be informed as to the defamatory imputation which lies hidden behind the mask of innocent-appearing words. The innuendo, while useful, is not an independent averment, hence it can only operate to indicate the connection and the result of facts already shown. It can fix the meaning of the words by reference to those facts, but may not go beyond the proper limit thereof. Conversely, it has often been stated that no innuendo is necessary where the defamatory meaning of words is apparent from the words themselves, though one may be inserted to heighten the effect.[57] This latter rule is probably sound since a defamatory connotation which is culled from unambiguous language should be as evident to the court as it appears to be to the plaintiff. In such a case, an innuendo which attempted to attach an unnatural meaning to the language used by the defendant,[58] or rested upon the existence

[55] See notes 12 to 19, ante. By way of further illustration, it could be said that to say of a woman that she had just given birth to twins would convey no defamatory meaning unless it were pleaded, by way of inducement, that the listeners knew the woman was single or only recently married. This example is drawn from the facts in the case of Morrison v. Ritchie & Co., 39 Scottish L. R. 432 (1902).

[56] See note 20, ante. In Savage v. Robery, 2 Salk. 694, 91 Eng. Rep. 588 (1688), the plaintiff, a trader, averred that the defendant had said: "You are a cheat, and have been a cheat for divers years." Judgment on a verdict for plaintiff was arrested because, while it was charged that the words were spoken of and concerning the plaintiff, the colloquium failed to charge they were also spoken of and concerning the plaintiff in his trade, in which application only would such words be defamatory *per se*.

[57] Newell, op. cit., § 542; 53 C. J. S., Libel and Slander, § 162, p. 249.

[58] In Campbell v. Morris, 224 Ill. App. 569 (1922), the defendant's letter charged plaintiff with posing as a Mason in good standing. Plaintiff interpreted this to be an accusation that he was an imposter. The court rejected the innuendo as being an unnatural one.

of extrinsic facts which had not been pleaded, would clearly be improper.[59]

Returning once again to the proposition that, in determining whether the defendant's charge is libel *per se,* the court may consider only the words themselves, it will be meaningful to inquire as to whether Illinois has actually adopted this rule, as the Brewer case would seem to assert. The origin for such a harsh doctrine in Illinois would be difficult to locate.[60] Indeed, until late in the nineteenth century, most cases of defamation arising within the state dealt with slander rather than libel, although the converse appears to be the rule today. Probably the first of the defamation cases in Illinois, that of *Blair* v. *Sharp,*[61] was decided in 1820. The declaration there alleged that the defendant had said, of the plaintiff, that he "had swore a lie." The Supreme Court held the declaration to be defective because the plaintiff had failed to allege to what these words applied. A footnote to the case, supplied by Judge Breese, who collected the cases appearing in the first volume of the state reports, points out that, to be liable, the defendant must have charged the plaintiff with committing perjury.[62] The decision would seem to contain a tacit admission by the court to the effect that extrinsic cir-

59 Voris v. Street & Smith Pub. Co., 330 Ill. App. 409, 71 N. E. (2d) 338 (1947). The limited use to which an innuendo may be put has resulted in some reckless statements by Illinois courts. Thus, it has been said at times that innuendoes are not available to impute libel to an article which in itself is otherwise innocent of any libelous meaning: Dilling v. Illinois Pub. & Printing Co., 340 Ill. App. 303, 91 N. E. (2d) 635 (1950), appeal dismissed 341 Ill. App. xv; LaGrange Press v. Citizen Pub. Co., 252 Ill. App. 482 (1929), cert. den. 256 Ill. App. xlviii. This statement would appear to be misleading in the light of language in the case of Life Printing & Pub. Co. v. Field, 324 Ill. App. 254 at 262, 58 N. E. (2d) 307 at 311 (1944), where the court, quoting with approval from McLaughlin v. Fisher, 136 Ill. 111 at 116, 24 N. E. 60 at 62 (1890), said: "It is not permissible to enlarge and extend the meaning of the words spoken, beyond their natural import, by the innuendo, except so far as such enlarged meaning is warranted by prefatory matter set forth in the inducement or colloquium. An innuendo is properly used to point the meaning of the words alleged to have been spoken, in view of the occasion and circumstances, whether appearing in the words themselves, or extraneous prefatory matters alleged in the declaration." See also Old Dearborn Distrib. Co. v. Seagram Distilling Corp., 288 Ill. App. 79, 5 N. E. (2d) 610 (1937).

60 The doctrine has no support in common law precedent: McCormick, op. cit., p. 416; Prosser, op. cit., p. 798.

61 1 Ill. (Breese) 30 (1820).

62 1 Ill. (Breese) 30 at 31, note (a). The case would be decided differently today because, by statute, a charge of false swearing has been made actionable: Ill. Rev. Stat. 1953, Vol. 2, Ch. 126, § 2.

cumstances would be material in determining the sufficiency of the declaration since only by a proper inducement and innuendo could it be made to appear precisely to what the words referred as, for instance, that in a legal proceeding before a court of competent jurisdiction, in which the plaintiff, being under oath, had testified on a matter material to the issues therein, the plaintiff had supposedly given false testimony.

More to the point is the case of *Patterson* v. *Edwards*,[63] decided in 1845. The defendant there allegedly spoke of the plaintiff, saying: "Mrs. Edwards has raised a family of children by a Negroe." Plaintiff had contended that these words charged her with fornication or adultery, but the Illinois Supreme Court said the declaration was defective, and it reversed a verdict and judgment of the trial court with leave to amend, because the innuendo ascribed to these words was deemed to be improper in the absence of other facts which should have been pleaded by way of introduction. The court went on to say that it could readily think of facts which the plaintiff might have averred to accomplish this and from which the desired innuendo could have been drawn. These two cases indicate that, at least in the earlier slander cases, the court did not feel itself constrained by any such rigid requirement as was later expressed in the Brewer case.

It was not until 1873 that the Illinois Supreme Court was confronted, for the first time, with a libel case in which it was necessary for the plaintiff to establish the defamatory meaning by reference to extrinsic circumstances. In a case in that year, one entitled *Strader* v. *Snyder*,[64] the plaintiff had alleged a considerable amount of extrinsic material, in addition to repeating the words written by the defendant, and concluded that the words used charged adultery. The trial court agreed with this conclusion and so instructed the jury. On appeal, however, the higher court reversed a judgment for the plaintiff and ordered a new trial, saying the words did not, in common acceptation and without the aid of extrinsic matters, charge adultery. It was error,

[63] 7 Ill. (2 Gil.) 720 (1845).
[64] 67 Ill. 404 (1873).

therefore, concluded the court, to relieve the plaintiff of the burden of proving the extrinsic matters which had been alleged by him as well as the application thereof to the words used. If anything, this case would provide ample support for the opinion that the expressions to be found in the Brewer case were not considered as representing the original viewpoint of the Illinois Supreme Court.

The case of *Young* v. *Gilbert*,[65] decided in 1879, did nothing to change this view although it involved an allegedly libelous advertisement published in a newspaper at the instance of the defendant. The defendant contended that he had merely replied to an advertisement previously published by the plaintiff. The trial court excluded defendant's evidence as to the earlier advertisement by plaintiff and judgment was entered for plaintiff. On appeal, the Illinois Supreme Court, noting that the defendant's words had an entirely different signification when read in the light of plaintiff's prior advertisement, reversed this holding. It said, with a degree of emphasis, that in libel and in slander "it is important to the proper understanding of the meaning of the words written or spoken, and of the motives and purposes of the same, that it should be shown to the court and jury what was the subject matter about which the defendant was writing or speaking."[66] While, in the usual case, it is the plaintiff who wants to show these extrinsic matters to convince the court that seemingly innocent words actually operated to convey a defamatory meaning, in the case mentioned, the argument was advanced by a defendant to show that the damning words were actually privileged. In fairness, the principle should apply alike to either party.

It would appear that the first, and quite likely the only, case to date in the Illinois state court system which has embraced the doctrine later enunciated by the Brewer case is the holding of the Appellate Court for the First District in *LaGrange Press* v.

[65] 93 Ill. 595 (1879).

[66] 93 Ill. 595 at 596.

Citizen Publishing Company.[67] In that case, the defendant had published a story to the effect that the plaintiff newspaper had had its application for entry to the mails turned down by the post office department. Plaintiff's complaint had initially referred to the federal postal laws describing nonmailable matter, which statute bars all fraudulent or obscene publications from the mails. Plaintiff thereafter drew the conclusion, by way of innuendo, that reasonable readers would understand that defendant meant to imply that plaintiff was conducting its business by fraud or obscenity in contravention of the federal statute. The trial court sustained a demurrer to the complaint and dismissed the suit.

On appeal, the reviewing court, after stating the facts of the case, immediately launched into a statement of relevant law beginning with the following: "In determining whether or not the published article is libelous *per se,* we must view it stripped of all innuendo, colloquium or extrinsic of explanatory circumstances, and if the words are unambiguous and incapable of an innocent meaning they may be declared libelous as a matter of law."[68] The holding of the trial court was affirmed, but this result was attained entirely on the basis that the federal law made it possible for the postal authorities to exclude the plaintiff's newspaper from the mails for other, and entirely innocent, reasons. Thus, reasoned the court, the defendant's article was not fairly susceptible of any defamatory imputation.

It should be noted that none of the Illinois cases noted above, nor those cited in the LaGrange Press case, are authority for the proposition that it would be improper to draw innuendoes in a complaint based on defamation, provided adequate foundation had been laid and the inference drawn was not an irrational one.

[67] 252 Ill. App. 482 (1929), cert. den. 256 Ill. App. xlviii.

[68] 252 Ill. App. 482 at 485. The court cited Dowie v. Priddle, 216 Ill. 553 (1905); Schmisseur v. Kreilich, 92 Ill. 347 (1879); Slaughter v. Johnson, 181 Ill. App. 693 (1913); Erick Bowman Remedy Co. v. Jensen Salsbery Laboratories, Inc., 17 F. (2d) 255 (1926); Burr v. Winnett Times Pub. Co., 80 Mont. 70, 258 P. 242 (1927); and Kee v. Armstrong, Byrd & Co., 75 Okla. 84, 151 P. 572, on rehearing in 175 P. 836 and 182 P. 494 (1919).

If anything, these cases indicate, at least impliedly, that this method of pleading would be at least appropriate and, at times, even necessary. In effect, therefore, the doctrine of the Brewer case represents an importation from other jurisdictions, made without consideration either as to its logic or its justification and under the mistaken belief that precedent commanded its application.

Once the manner of pleading the gravamen has been determined upon, little more remains to be said. The plaintiff will, in all probability, wish to charge that the disparaging statements about him, which he has attributed to the defendant, were in fact false. Since this is presumed to be the case, no proof need be entered by the plaintiff to substantiate this allegation, unless the defendant should place the matter in issue by raising the defense of truth in the answer.[69] Even then, the burden of proof would be on the defendant[70] so the question of innocence, therefore, offers little obstacle to the plaintiff, at least during the pleading stage. Whether the allegation could safely be omitted, however, is a matter of some doubt.[71]

Bearing in mind those distinctions which have been drawn regarding the difference between defamation *per se* and not *per se*[72] with respect to the matter of pleading damages, the complaint may have to be rounded out with a paragraph in which the pleader would have to charge, by way of aggravation, the par-

[69] Newell, op. cit., § 524; 53 C. J. S., Libel and Slander, § 217, pp. 327-8. Illinois is probably in accord with this proposition. See Ogren v. Rockford Star Printing Co., 288 Ill. 405, 123 N. E. 587 (1919), and the abstract opinion in Kulesza v. Alliance Printers & Publishers, Inc., 318 Ill. App. 231, 47 N. E. (2d) 547 (1943). A recent case, however, reached the rather disturbing conclusion that where a charge is not libelous *per se* the plaintiff has the burden of proving falsity as well as malice and special damages: Tiernan v. East Shore Newspapers, Inc., 1 Ill. App. (2d) 150, 116 N. E. (2d) 896 (1953).

[70] Ogren v. Rockford Star Printing Co., 288 Ill. 405, 123 N. E. 587 (1919); 53 C. J. S., Libel and Slander, § 217, pp. 327-8.

[71] The case of Old Dearborn Distrib. Co. v. Seagram Distilling Corp., 288 Ill. App. 79, 5 N. E. (2d) 610 (1937), might be considered as indicating that the allegation is essential. See also 53 C. J. S., Libel and Slander, § 167, pp. 263-4.

[72] See notes 39 to 47, ante.

ticular items of special damage which he believes have been proximately caused by the defendant's wrongful acts. The specification thereof will necessarily vary from case to case, so it is not possible to do more than suggest that the items claimed must not be speculative in character and must be such as can be measured in dollar equivalents[73] but may be increased by a claim for exemplary damages so long as the total does not exceed the amount of the *ad damnum* stated in the complaint.[74]

[73] McCormick, op. cit., p. 415 et seq.

[74] The complaint may be amended, according to the abstract decision in the case Hunsley v. Wurl, 341 Ill. App. 247, 93 N. E. (2d) 151 (1950), in the event the verdict is for a larger sum than that stated in the complaint. On the subject of the right to secure exemplary damages, see Rearick v. Wilcox, 81 Ill. 77 (1876), and Lion Oil Co. v. Sinclair Refining Co., 252 Ill. App. 92 (1929).