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From Figment To Fiction To Philosophy—The Requirement Of Proof Of Damages In Libel Actions

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An Introduction

A few years ago, the small band of academics, judges, and practitioners, to whom the law of defamation is something more than a by-passed quagmire in a seldom travelled section of the legal estate, were enthralled by a spectacle. The American Law Institute was considering revisions to the defamation victims of the *Restatement of Torts*. Dean William L. Prosser[1] and Laurence H. Eldredge[2] stood toe-to-toe and slugged it out over the issues of whether and when damages must be alleged and proven to constitute an action for libel. Within a format of professed mutual esteem, they leveled verbal blasts at one another of an intensity not frequently encountered.[3]

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1. Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629 (1966) [hereinafter cited as Prosser II]. *See also* Prosser, *Libel Per Quod*, 46 VA. L. REV. 839 (1960) [hereinafter cited as Prosser I].

2. Eldredge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966) [hereinafter cited as Eldredge]. *See also* Eldredge, *Variation on Libel Per Quod*, 25 VAND. L. REV. 79 (1972), in which the author takes up the cudgels for another much disputed proposition: that libel law imposes strict liability, regardless of fault.

3. Eldredge 735: "[T]he statements . . . made by Dean Prosser . . . do not accurately describe the present state of the American decisional law."

Eldredge 744: "In view of the fact that any statement by Dean Prosser concerning

The protagonists each analyzed the same substantial body of legal precedents, and, remarkably, came to diametrically opposite conclusions as to the present state of the American law. Their difference was not merely the frequently encountered one over what the law should be, but rather over what rules the authorities actually had developed.

Eldredge argued that the American state courts favored the English rule that damages in all libel cases will be presumed and need not be proven, whether the defamatory character of the language is evident from its face or must be established by the aid of extrinsic facts pleaded and proven. His position coincided with the rule adopted in the original *Restatement of Torts.*

Prosser, on the other hand, maintained that the courts hold that special damages[4] must be alleged and proven where the defamatory significance of

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tort law is read with respect (and his reputation in the field of torts calls for respectful reading), it becomes necessary to analyze these cases in order to make it clear that this time 'Homer nodded.' "

Prosser II, at 1629: "Mr. Laurence H. Eldredge, an able Philadelphia lawyer and an old and good friend of mine whose esteem I value highly, has done me the honor to disagree with me. . . ."

Prosser II, at 1630: "Mr. Eldredge accuses me of being inaccurate in describing the present state of the American decisions. The imputation, I would suppose, is one of negligent misrepresentation."

Prosser II, at 1635: "Further examples might be multiplied, if there were room, in which Mr. Eldredge has been what Shakespeare called a snapper-up of unconsidered trifles."

Prosser II, at 1636: ". . . Mr. Eldredge has erected a fantastic edifice of an overwhelming weight of authority in support of his position. The structure is built upon sand."

Prosser II, at 1636: ". . . the kind of casual tossed-in language on which Mr. Eldredge relies throughout."

Prosser II, at 1637: "Mr. Eldredge says . . . . [W]ith deference to a learned scholar and an old friend, this is nonsense."

4. There is a pitfall to be avoided here. Where damages are presumed, they are denominated "general." "Special" damages, however, do not comprise all provable harm flowing from a publication and capable of compensation by money award, but rather are restricted to direct pecuniary loss. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 760 (4th ed. 1971) [hereinafter cited as HANDBOOK]. There is another category of damages not strictly pecuniary in nature for which, in computing general damages, the jury is permitted to make allowance, 1 F. HARPER & F. JAMES, LAW OF TORTS 470 (1956) so the plaintiff should be able to recover such items as an element of special damages, particularly the loss of the society of others and the injury to his feelings demonstrably and foreseeably growing out of the publication. *See, e.g.,* Nolan v. Traber, 49 Md. 460, 462, 470 (1878). A recovery for the plaintiff's humiliation or mental suffering is in the category of compensatory damages. HANDBOOK 801. The loss of the society of neighbors is the rationale behind classification of a charge of loathsome disease as actionable "per se." Carr, *The English Law of Defamation,* 18 L.Q. REV. 255, 257 (1902).

Nevertheless, emotional distress and loss of society are not elements of special damage. RESTATEMENT OF TORTS § 575, comments *b* and *c* at 185-88 (1938). The injustice of the exclusion of evidence of emotional distress as an element of special damage has been noted in Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 659 (D.C. Cir. 1966).

To compound the complications, which abound in this area, recovery of general

the words is not apparent on their face. To reach that result, he first adjusted the authorities he was attempting to reconcile by excluding the "exceptional" situations where, if the same words had been spoken, they would have been actionable as slander "per se", *i.e.*, without proof of special damages.[5] He acknowledged that, even if extrinsic evidence is needed to es-

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damages for injury to the plaintiff's feelings is, in theory, restricted to the consequences of learning that others have heard or read the defamation. The plaintiff may not recover for the unhappiness experienced from reading or hearing the words himself. HANDBOOK 737; Prosser, *Developments in the Law—Defamation,* 69 HARV. L. REV. 875, 937 (1956); Terwilliger v. Wands, 25 Barb. 313 (S.Ct. N.Y. 1855), *aff'd,* 17 N.Y. 54 (1858). Another devious twist is provided by the rule that, while emotional distress is not, of itself, special damage, "per se," it becomes such if another independent item of special damage is proven. RESTATEMENT OF TORTS § 623, comment *a* at 326 (1938). *But see Developments in the Law—Defamation, supra* at 939-40.

In any event, it would have been a happier application of words and a preferable formulation of the law if special damages for defamation had been defined as all provable injury foreseeably growing out of the tort. The requirement of special damages, however, was regarded as a safeguard against a deluge of petty defamation cases, and, to insure its effectiveness, special damages were given a restricted rather than expansive interpretation. *See* Note, *Libel Per Se and Special Damages,* 13 VAND. L. REV. 730, 731, n.9 (1960); Comment, *Libel and Slander: Libel Per Se: Necessity of Alleging and Proving Special Damage in Libel Suits,* 14 CALIF. L. REV. 61, 62 (1925); 1 T. STREET, FOUNDATIONS OF LEGAL LIABILITY 283-84 (1906).

Many courts have probably meant all provable damages when they have employed the words "special damages." *Cf.* Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53 (1966) (held: an action for defamation by an employer's official against a union cannot be based on presumed general damages). The Court maintained that "a complainant may not recover except on proof of such harm, which may include general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law." *Id.* at 65. Manifestly, this would allow recovery for all provable injury flowing from the libel, including several items excluded from the common law's definition of "special damages." Yet, in the dissenting opinions, the majority's description of what could be recovered was depicted as "special damages." *Id.* at 70, 73. For purposes of clarity the term "special damages" will here be accorded its traditional definition of provable pecuniary harm, while "provable damages" will mean all harm, pecuniary or other, which is capable of establishment by evidence and compensable by money award.

5. Prosser I, at 844; Prosser II, at 1630-31. This is a distinction not expressed or recognized by the courts. Cases cited for it by Prosser do not go on this rationale. One commentator notes that the rule advocated by Dean Prosser is a means for reconciling otherwise apparently divergent opinions of the New York Court of Appeals, but will not serve to explain the decisions of the New York lower courts. Henn, *Libel-By-Extrinsic-Fact,* 47 CORNELL L. Q. 14, 42, 49 (1961). Henn recognizes that, while the approach is one evolved by commentators which brings into line some cases, "the limitation is not articulated in such opinions." *Id.* at 49. *Cf.* 1 A. HANSON, LIBEL AND RELATED TORTS 24 (1969) [hereinafter cited as HANSON] (explaining Prosser's "four category exception" as necessary to avoid an anomalous result in which spoken words would be more actionable than written ones).

One decision reached subsequent to Dean Prosser's articles demonstrates the powerful sway which he exercises by purporting to apply the rule suggested by him. Wegner v. Radio Cowboys Ass'n, 290 F. Supp. 369 (D. Colo. 1968), *aff'd,* 417 F.2d 881 (10th Cir. 1969). However, the ruling was grounded on a state court decision, Bernstein v. Dun & Bradstreet, Inc., 149 Colo. 150, 156, 368 P.2d 780, 783 (1962), which, while it "did not disagree" with Prosser's placing of Colorado among the jurisdictions support-

tablish that words fall in a "per se" category,[6] still no special damages need be pleaded to make out a libel action.[7]

It is elementary that one who intervenes in a fight runs a substantial risk that the opponents may suspend their operations against each other and make common cause against the interloper. The risk entails potentially serious repercussions where the two combatants are worthy contenders for the world championship in the division being contested. However, a consequence of the Prosser-Eldredge controversy has been the suspension of efforts by the American Law Institute to bring up to date its earlier pronouncements on the American law of defamation, derived from the cases as they were read in 1938 when the original *Restatement of Torts* appeared.[8]

After a relatively long period of desuetude, the law of libel and slander has undergone a recent revitalization, with a marked acceleration in the rate of institution of cases.[9] In the interval, the transition from a largely rural to a principally urban society has taken place. As a consequence, the stereotype of a juror has changed from the sturdy farmer with a keen sense of the value of a dollar and an awareness of the limits on probable harm from nasty rumors launched in his community, to the city dweller whose unequal struggle with the Micawber equation has led him on occasion to seek escape in the big hit in the numbers game or the successful long-shot at the racetrack.[10] The city dweller may experience a vicarious satisfaction in helping a libel case plaintiff to the pot of gold at the end of the rainbow, especially where the defendant often symbolizes the forces which press on the average urban citizen and to which he ascribes many of his misfortunes.

Stereotypes are, of course, dangerous foundations on which to build any legal proposition, but it is evident that the growth in the size of verdicts

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ing his proposition, specifically left the question open. The Tenth Circuit reasoned that the Colorado court's statement was a dictum which had to be applied. However, it also supported its conclusion by a citation of RESTATEMENT OF TORTS § 569, at 165-69 (1938), which asserts that all libel is actionable "per se."

6. *I.e.*, charge a crime, impute a loathsome disease, injure the plaintiff in his office, trade, or business, or impugn the chastity of a woman.

7. Prosser I, at 844; Prosser II, at 1630; RESTATEMENT (SECOND) OF TORTS 83, 84, 86 (Tent. Draft No. 11, 1965); HANDBOOK 763.

8. *See* RESTATEMENT (SECOND) OF TORTS 1 (Tent. Draft No. 13, 1967).

9. HANSON, *supra* note 5, Preface at vii, where it is indicated that, commencing in the late 1950's, a movement developed by which "the number of libel suits brought expanded by several hundred percent."

10. *Cf.* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 157 (1921): "Here, . . . we see an exaggerated reliance upon general reputation as a test for the ascertainment of the character of litigants or witnesses. Such a faith is a survival of more simple times. It was justified in days when men lived in small communities. Perhaps it has some justification even now in rural districts. In the life of great cities, it has made evidence of character a farce."

for general and punitive damages has far outrun inflation.[11] The Supreme Court has inserted itself into the area of defamation—a field traditionally regarded as the exclusive prerogative of State courts[12]—by deciding *New York Times Co. v. Sullivan*[13] and the spate of connected cases, inevitably and tediously described as its progeny.[14]

In time that line of decisions may come to be seen as principally a product of a concern for the brutal consequences of the essentially unlimited verdict for general damages[15] in libel cases and dislike for wide discrepancies in different State court tests of what constitutes actual malice[16] which render

11. Until 1969, the largest defamation verdict in Maryland appears to have been $45,000, a combined award of general and punitive damages on an editorial appearing in a daily newspaper of wide circulation. A.S. Abell Co. v. Kirby, 227 Md. 267, 176 A.2d 340 (1961). In 1969, a jury awarded, with respect to an investigatory report on a prospective insured, published only to a remote and anonymous underwriter, $100,000 in compensatory damages, $500,000 in punitive damages. The verdict for punitive damages was cut by remittitur to $150,000, and, on appeal, there was a reversal on statute of limitations grounds. Atwell v. Retail Credit Co., 431 F.2d 1008 (4th Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971).

12. *See* Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); Roth v. United States, 354 U.S. 476, 483 (1957); Near v. Minnesota, *ex rel.* Olson, 283 U.S. 697, 709 (1931); Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

13. 376 U.S. 254 (1964).

14. Garrison v. Louisiana, 379 U.S. 64 (1964); Henry v. Collins, 380 U.S. 356 (1965); Linn v. Plant Guard Workers, 383 U.S. 53 (1966); Rosenblatt v. Baer, 383 U.S. 75 (1966); Time, Inc. v. Hill, 385 U.S. 374 (1967); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967); St. Amant v. Thompson, 390 U.S. 727 (1968); Pickering v. Board of Education, 391 U.S. 563 (1968); Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971); Time, Inc. v. Pape, 401 U.S. 279 (1971); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

15. *See* Arkin & Granquist, *The Presumption of General Damages in the Law of Constitutional Libel*, 68 COLUM. L. REV. 1482, 1485 (1968): "The Court was obviously concerned with the threat to free public discussion caused by large libel judgments in favor of public officials who may not have suffered any actual loss of reputation. This concern, however, did not lead to any direct consideration in *Sullivan* of the constitutionality of the presumption on which such awards might be based."

The concern is unambiguously expressed in the dissenting opinions of Justices Harlan, Marshall, and Stewart in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 62, 78 (1971). The dissenters regarded the presumption of damages as incompatible with the first amendment. The majority did not disagree, resting their decision on other grounds which they regarded as going further than a rule simply outlawing general damages. Justice White, concurring, summed up the situation: "Some members of the Court seem haunted by fears of self-censorship by the press and of damage judgments that will threaten its financial health." *Id.* at 60.

16. *See* Note, *A Mercantile Agency's Credit Reporting is Privileged Unless a Report is Made with Knowledge That it is False or with Reckless Disregard of Truth or Falsity*, 49 TEX. L. REV. 198, 200 (1970) commenting on Dun & Bradstreet, Inc. v. O'Neil, 456 S.W.2d 896 (Tex. 1970), where a factor suggested as being behind an extension of the rule in *New York Times Co. v. Sullivan* to credit reports was the variety of definitions of actual malice to overcome the common law privilege applicable to such reports: "Some courts hold that the privilege of a mercantile agency is lost by a showing of negligence, but most jurisdictions require a showing of

speech or press considerably less free in some places than in others. Such an explanation will make more sense in the long run, and better serve to ease the Supreme Court's case-load burden than the articulated concern of the cases as to the precise line of demarcation between proper exercise of the rights of free speech and free press, on the one hand, and governmental protection of other desirable private interests from the onslaught of words, on the other.

If, when *New York Times Co. v. Sullivan* arrived on the Court's docket for decision, due process[17] alarms had not been sounded by the size of the verdict[18] and if equal protection anxieties had not been aroused by the prospect of a newspaper circulating free of any threat of a libel action in its own state but exposed to actions elsewhere,[19] the Supreme Court might not have been so quick to employ the rationale it did. The rule enunciated was that the first amendment protected utterances in the public interest (particularly those relating to public officials and to public figures) from defamation actions in the absence of what the Court denominated actual malice: *i.e.*, knowing falsity on the defendant's part or its substantial equivalent—reckless disregard of truth or falsity.

Unhappily, that rationale puts the already over-burdened Supreme Court in the time-consuming business of case-by-case independent examination of the record as a whole to determine whether the public interest suffices to give first amendment protection to the utterance and whether the evidence of actual malice is convincing enough to meet constitutional standards.[20] To spare the Supreme Court for the multitude of other cases of greater national moment crying out for its attention, it is imperative that courts look for com-

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malice, although their definitions of malice vary substantially." *Cf.* Recent Development, *The Future of Common-Law Libel Actions under the Fair Credit Reporting Act*, 21 CATH. U. L. REV. 201 (1971).

17. *Cf.* Arkin & Granquist, *supra* note 15, at 1492.

18. $500,000—unallocated between punitive and general damages.

19. Wright, *Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach*, 46 TEX. L. REV. 630, 643-44 (1968):

> Obviously *New York Times* has added a new dimension to the law of libel. Its effect has been to impose first amendment limitations on state actions for defamation and possibly on state actions for invasion of privacy as well. The development of these limitations is only a much needed first step, however, in establishing some uniformity among the defamation laws of the several states. . . .
>
> . . . Consider, for example, the facts in *New York Times Company v. Sullivan*, where the defendant published The New York Times in New York City and yet 394 of the 650,000 copies containing the accused advertisement were distributed in Alabama. . . . [A] publisher may be subject to suit simultaneously in several jurisdictions, each of which has its own network of defamation doctrines. The publisher should not be put to such a burden.

20. *See* Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 53, 55 (1971).

mon law doctrines which will both lessen the opportunity for capriciousness in the fixing of the amounts of defamation case awards and, at the same time, achieve a uniformity of application of principles throughout the United States.[21] To the latter end, it is important that the American Law Institute take up again the subject which the Prosser-Eldredge controversy in part caused it to lay aside.[22] A contemporary statement of the best considered rule of law can do much to promote uniformity. If the rule so chosen were to be the one suggested in this article, the other objective of reduction of capriciousness in verdicts would also be furthered.

It is the purpose of this study to suggest that Dean Prosser and Mr. Eldredge let either the heat of battle or excessive veneration for the written word of the judges affect their usual discriminating judgments. Neither adequately recognizes the larger setting in which the rule should be considered and formulated, and neither submits a proposal which would truly reflect the essence of the cases. It is, no doubt, beyond the capabilities of this author to remedy the situation, single-handedly; however, he hopes to stimulate the collective genius of the American Law Institute to come to grips with the problem and to propose a workable solution.[23]

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21. Apparently to foster this objective, the Supreme Court of Texas, in a case involving the privilege attaching to credit reports, held that a plaintiff would have to meet the *New York Times Co. v. Sullivan* standard to establish actual malice to overcome the common law privilege. Dun & Bradstreet, Inc. v. O'Neil, 456 S.W.2d 896 (Tex. 1970). By importing into the Texas common law a national standard of actual malice, the Court was clearly promoting uniformity. The Maryland Court of Appeals has similarly read *New York Times Co. v. Sullivan* as having imposed certain responsibilities on state courts even in dealing with state libel law questions outside the direct orbit of that case. Werber v. Klopfer, 260 Md. 486, 491, 272 A.2d 631, 634 (1971):

> But since we think Werber's statement was not libelous there is no need to discuss his claim of privilege and the concomitant issues of 'actual malice', as defined by the Supreme Court, and its effect, if any, upon the traditional notions of libel per se. And in reaching our conclusion we have been mindful of the admonition of the Supreme Court that 'we must . . . review the evidence . . . [and that] we must make an independent examination of the whole record . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.'

22. The other reason was the appearance on the scene of *New York Times Co. v. Sullivan*, and the cases growing out of that decision, especially Time Inc. v. Hill, 385 U.S. 374 (1967), and the need to consider their impact on the subject. RESTATEMENT (SECOND) OF TORTS 1 (Tent. Draft No. 13, 1967).

23. It is apropos at this juncture to make an observation about bias. Mr. Eldredge was candid enough to acknowledge that his career at the bar involved representation of plaintiffs in defamation cases. Eldredge 755.

That comment earned him a testy complaint from Dean Prosser that the latter was feeling the wrath reserved by plaintiffs' advocates for anyone who expresses a rule which favors defendants. Prosser II, at 1637, 1648. This article suggests an approach less favorable to defendants in some respects, more favorable in others than the rule deduced by Dean Prosser. The author's experience in the defamation field derives almost exclusively from representation of defendants, principally newspapers. An effort at objectivity has, nevertheless, been made, and, as for subconscious bias, it

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As a starting point for the inquiry, it is necessary to bear in mind that libel and slander are not the only verbal torts. Rather, they constitute but a segment of the circle of actionable wrongs which one should classify as communication torts.[24] However, defamation—the distinctive element of libel and slander—gave these two torts an extraordinary importance in earlier times, when honor would drive a man to desperate acts rather than allow a slighting remark to go unpunished.[25] Consequently, the number of libel and slander cases was relatively large, as contrasted to the number of suits for the related communication torts, and, in time, defamation became *the*, if not the *only*, action in this area.[26]

The others were always there, however, though for some time they could not be directly perceived, but rather were sensed by reason of their gravitational influence on libel and slander. Some, it is true, came into view early,[27] but the prevailing attitudes exalting rugged individualism[28] were not

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might be observed that clever defense counsel with only immediate personal advantage in mind should rejoice in the adoption of any rules favoring plaintiffs, both because they will stimulate litigation, and because they will provide grounds of excuse with which to pacify a disgruntled client when a case has been lost.

The whole matter is complicated by the fact that it is not always possible to tell which proposals are pro-plaintiff and which pro-defendant. It has been suggested that the rule that damages are presumed in libel actions may, in fact, have hurt plaintiffs in the long run. Probert, *Defamation, A Camouflage of Psychic Interests: The Beginning of a Behavioral Analysis,* 15 VAND. L. REV. 1173, 1189 (1962). A solution whereby proof of damages is required, but the plaintiff is permitted to show all elements of consequential harm, is advocated as better from the plaintiff's standpoint.

24. In contradistinction to those wrongs occasioning physical injuries to the person or to tangible property.

25. A novelist portrays the mid-eighteenth century London scene very well:

> Duels . . . were serious matters even in a time when every man carried a small-sword by his breeches-pocket. . . . While it had been established that a gentleman was bound to defend his honour with cold steel, it seemed also understood that in such encounters even victory might be purchased at too dear a price. Nevertheless, so riotous were the habits of the day, encouraging to the utmost card-playing and the free use of wine, so lax was the administration of the law, and so stringent the code of public opinion, that scarcely a week passed without an encounter, more or less bloody, between men of education and intellect, who would have considered themselves dishonoured had they not been ready at any moment to support a jest, an argument, or an insult, with naked steel.

G.J. Whyte-Melville, Katerfelto 17, (World Library ed.).

26. Other communication torts include invasion of privacy, deceit, injurious falsehood, malicious prosecution, and abuse of process.

27. For example, slander of goods was recognized as early as 1320. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 484, n.7 (5th ed. 1956) [hereinafter cited as PLUCKNETT]. It is confirmation of the early preeminence of slander and libel as the important communication torts that, when injurious falsehood thus raised its head, it was explained and denominated in defamation terms as "slander" of goods or of title or as trade "libel" even though it was clearly distinct and possessed of manifestly different characteristics. HANDBOOK 915 refers to the "ancient, left-handed association"

favorable to those complaining that the maleficent use of non-defamatory language by a defendant should be the subject of a recovery. Thus, the action of deceit, though it was recognized as early as 1201, was hemmed in by many restrictions and exceptions.[29] Nevertheless, the acknowledgment of its existence gave proof that, in certain circumstances, falsehoods other than defamatory ones could be injurious, and hence the basis for recovery in an action at law.

Subsequently, a number of other behavioral patterns have been identified as falling within the "injurious falsehood" category, and have been made the bases of recoveries, provided that the plaintiff proves the damages which he has suffered as a consequence of the falsehood.[30]

Nor, as the cases have come to recognize, is falsity always an essential ingredient of a communication tort. There can be injurious and actionable truth. The most obvious case is invasion of privacy.[31] A famous football quarterback may have become addicted in early boyhood to a certain brand of breakfast food. Nevertheless, if the producer of the cereal were to advertise this true fact, without the consent of the athlete, an action would lie.[32]

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of injurious falsehood with defamation, and, deprecates the supposed analogy to defamation which "has hung over the tort like a fog, concealing its real character, and has had great influence upon its development." *Id.* at 916.

28. As signified by the extremes to which the doctrine of *caveat emptor* developed.

29. Among them scienter and privity. *See* PLUCKNETT 640; HANDBOOK 685-86, 693, 701-02, 707. It is observed: "Consequently the action has been colored to a considerable extent by the ethics of bargaining between distrustful adversaries." *Id.* at 684. Even more explicit is the following observation from 1 F. HARPER & F. JAMES, *supra* note 4, Introduction at xxxiv:

> Individualism . . . constantly crops into the rules of the common law governing the business relations of life. For several centuries, the buyer, defrauded by the seller's deliberate chicanery and misrepresentation, had no recourse whatever. When a method of redress was developed, the remedy was closely circumscribed to insure that one man could not pass on to another with whom he had dealt the consequences of his own inadequate bargaining ability. To this day, the cases in deceit abound in justifications of "trade talk," "puffing," and other judge-invented euphemisms for that "natural" tendency of the trader to extol the merits of his wares.

30. The actions classified as injurious falsehood (some of which overlap or are different names for the same things) include (a) slander of title, (b) disparagement of property, (c) slander of goods, (d) trade libel, (e) interference with business or economic relations. For each, the plaintiff is required to prove actual damage in the form of loss of a present or a prospective advantage. HANDBOOK 915-16.

31. Although Courts have been slow to recognize this. *See* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); HANDBOOK 802. An action for invasion of privacy "is maintainable even when all statements made are completely true and accurate." Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 654 (D.C. Cir. 1966).

32. HANDBOOK 804-05. Interestingly, in view of the wide public interest which would attend the every activity of the football hero (*cf.* Cepeda v. Cowles Magazines and Broadcasting, Inc., 392 F.2d 417 (9th Cir. 1968), *cert. denied*, 393 U.S. 840 (1968)), and especially those activities which might serve as beneficial examples to those seeking to emulate him, a sportswriter doing a sketch of the quarterback could

Similarly, cases of interference with advantageous business relationships cannot be defended on the grounds of truth. The person who says to an employee under contract to a competitor that "there is a job for you at twice the money if you will leave him and come with me," cannot defend by showing that there was, in fact, such a job awaiting the enticed employee.

It is in this setting that one must consider the torts of libel and slander. They encompass expressions, communicated to others than the plaintiff, which are (a) derogatory and (b) false. For a time, the unpopularity of attacks on honor, especially as they threatened serious breaches of the peace, made it doubtful whether falsity was an ingredient of the torts. For purposes of criminal libel, it was clear for a time that truth was no defense. "The greater the truth, the greater the libel" was applied in England until 1843 when it was largely abrogated by statute.[33] At the outset, it was even the rule in civil cases.[34]

However, in time it became established that free speech, insofar as truthful expression was concerned, had a sufficient beneficial effect to neutralize and overcome the contrary public interest in discouraging and punishing attacks on reputation. Truth[35] came universally to be recognized as a defense.[36] It is even supposed that limitations on the defense may be unconstitutional.[37] Nevertheless, in the spirit of compromise, the common law worked things out so that derogatory words would be presumed to be false, thereby sparing the plaintiff the awkwardness of proving a negative. Only if the defendant interjected the issue and assumed the burden of proving truth would it enter the case at all.[38]

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mention the breakfast food that made the difference. Time, Inc. v. Hill, 385 U.S. 374 (1967). Indeed, indications are that even if, through inadvertence, or even carelessness, he mentioned the wrong breakfast food, there would be no cause of action.

33. Ray, *Truth: A Defense to Libel*, 16 MINN. L. REV. 43, 46 (1931). Constitutional and statutory provisions making truth a defense in a criminal libel prosecution began to be adopted by the American states at even earlier dates, following the 1805 lead of New York. *Id.* at 47-48.

34. *Id.* at 49-51; PLUCKNETT 486, 490. *But see* W. ODGERS, A DIGEST OF THE LAW OF LIBEL AND SLANDER 157, 383 (6th ed. 1929) [hereinafter cited as ODGERS]; HANDBOOK 797.

35. Or "justification" in the style of the common law which seemed determined to employ words which would later engender confusion. *See, e.g.*, Simon v. Robinson, 221 Md. 200, 205, 154 A.2d 911, 914 (1959), where the court held it proper, in view of a plea of justification, to allow the defendant "to show justification in that the letter might be privileged, and thereby rebut, if he could, the presumption of constructive malice."

36. Curtis Publishing Co. v. Butts, 388 U.S. 130, 151 (1967) [Harlan, J.] "Truth has become an absolute defense in almost all cases . . . ."

37. In Farnsworth v. Tribune Co., 43 Ill. 2d 286, 290, 253 N.E.2d 408, 410 (1969), falling within the penumbra of *New York Times Co. v. Sullivan*, a provision of the Illinois Constitution restricting the defense of truth in a libel action to publications made with "good motives and for justifiable ends" was held incompatible with first amendment guarantees of free speech and free press.

38. This, like most statements of general applicability in the law of defamation, is

On the other hand, where the plaintiff is complaining of false words which, although not defamatory, nevertheless, did him an injury, it has always been the rule that the burden remains on him to prove the falsity.[39] Furthermore, in such cases, the usual rule has always applied that the plaintiff can recover only for such injury as he can show by competent evidence has flowed from the false expression.[40]

In this respect also, the plaintiff, complaining of derogatory words, was afforded a special advantage. After some early vacillations,[41] the English

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subject to a large exception. If the defendant eschews truth as a defense, and relies only on privilege—a defense which relates to the existence of an occasion making the utterance reasonable or even publicly beneficial to the point of protecting the utterer from liability, despite its false and derogatory nature—somewhat capriciously the law may require the plaintiff to prove not only actual malice (abuse by the defendant of the privilege) but falsity as well. Wetherby v. Retail Credit Co., 235 Md. 237, 242, 201 A.2d 344, 347 (1964); Broking v. Phoenix Newspapers, Inc., 76 Ariz. 334, 338, 340, 264 P.2d 413, 416, 417 (1953).

39. RESTATEMENT OF TORTS § 634, comment *a* at 354 (1938); HANDBOOK 920; C. GATLEY, LIBEL AND SLANDER 150 (6th ed. 1967) [hereinafter cited as GATLEY]; 1 F. HARPER & F. JAMES, *supra* note 4, at 476: "Truth of the disparagement, as in cases of defamation, constitutes a complete defense, but unlike the law of defamation, the burden of proof is on the plaintiff rather than the defendant."

40. J. MAYNE, ON DAMAGES 512 (11th ed. 1946):

> In cases of slander of title or the analogous cases of trade libels (neither of which is "Defamation" in the proper sense), the plaintiff must prove that the statements complained of were untrue, that they were made maliciously, i.e. without just cause or excuse, and that he had suffered special damage thereby. The damage is the gist of the action, and must therefore be specially alleged and proved.

41. *See* PLUCKNETT 491-97. That authority, Donnelly, *History of Defamation*, 1949 WISC. L. REV. 99, and RESTATEMENT OF TORTS § 568, comment *b* at 159-62 (1938), provide succinct resumes of the historical origins of libel and slander. They make clear that the concept of general damages sidled into the law of defamation as a consequence of the jurisdictional struggle between ecclesiastical courts and common law courts. Initially, defamation actions belonged to the church courts. The common law courts, with their genius for finding sophisticated arguments to expand their influence, came to reason that, if the charge sued on involved a crime so that there was an underlying issue cognizable in the king's courts, the defamation arising should also be tried there. *See* Green, *Slander and Libel*, 6 AM. L. REV. 593, 603 (1872). Since general damages were recoverable for trespass, defamation actions in which jurisdiction was so obtained also become actionable "per se." The injury to trade or business and loathsome disease categories, as they developed, were by analogy accorded the same "actionable per se" status. Then when the balance of the ecclesiastical jurisdiction in defamation was absorbed, it was on the theory that a church court could not give money damages to compensate for pecuniary loss, so that relief was inadequate. In such cases, the special damage requirement, being the basis for jurisdiction, was thought essential and retained, especially as it aided in controlling the flood of petty cases which threatened to inundate the courts. *See* note 4 *supra.*

Subsequently, this body of law, denominated slander, which had applied to written as well as to oral defamation, was restricted to the spoken word. Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 547 (1903). Libel law, developed in the Star Chamber, also applied to both oral and written defamation, but in taking it over from a defunct predecessor, the common law courts did not have to observe such niceties of jurisdictional fiction. The general damages concept was imported wholesale. This appears, perhaps, to have been because of the Star Cham-

common law was unequivocal: damages were presumed from the defamatory character of the words both in four defined categories of slander and in all cases of libel.[42] If he could, the plaintiff might additionally prove specific elements of damage, and thereby enhance his recovery.[43] Nevertheless, absent such proof, the jury was permitted to assess damages, based on *ad hoc* standards or on caprice, representing the difference in worth of the plaintiff's reputation, as valued before and after the defamatory utterance.[44]

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ber's preoccupation with criminal punishment of defamation. When damages were allowed to the injured party, they were concomitant with a fine, and so partook more of the nature of punitive than of compensatory damages. *Cf.* 1 T. STREET, *supra* note 4, at 292, where the criminal associations of libel are said to have been of substantial significance to the common law courts. Donnelly, *supra,* at 120-21 states: "There were at least three reasons which induced the judges . . . to hold written defamation actionable without proof of special damage. The first, and probably the most important, was the fact that written defamation was a crime." *See also,* Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries III,* 41 L.Q. REV. 13, 14-16 (1925). In effect, it would appear that the Star Chamber, when punishing seditious libel, frequently allotted part of the fine to the aggrieved individual.

One commentator, whose bias against defamation actions is so trenchantly expressed that one may doubt his scholarly objectivity, gives an additional explanation of the readiness of the Star Chamber to award general damages. Courtney, *Absurdities of the Law of Slander and Libel,* 36 AM. L. REV. 552, 553-54 (1902). Courtney ascribes general damage awards by the Star Chamber to a cynical scheme to mend the fortunes of often dissolute noblemen by allowing them recoveries, seldom justified against persons of less elevated social status.

Thereafter, the extraordinary and arbitrary solution to the question of how to reconcile law from two different sources, dealing with the same subject matter, was hit upon—one would be restricted to oral statements, the other to writings.

By this time, the origins of the rule allowing general damages had been totally obscured, and other reasons had been imagined to support the rule. *See, e.g.,* HANDBOOK 755. This is no uncommon occurrence. *See* O. HOLMES, THE COMMON LAW 5 (1881):

> The customs, beliefs or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career.

Cf. A.P. HERBERT, THE UNCOMMON LAW 145 (1935):

> Some trifle impels some law-making busybody to action; the busybody perishes, the trifle is forgotten, but the law remains: and later generations magnanimously invent a moral principle to account for it.

42. *See, e.g.,* GATLEY 2. As there indicated, the category involving charges of unchastity made of a woman was created by an 1891 statute, the Slander of Women Act, 54 & 55 Vict. c. 51. Such statutes were adopted much earlier in America, e.g., in Maryland by Ch. 114 of the Acts of 1838.

43. 1 F. HARPER & F. JAMES, *supra* note 4, at 470.

44. 4 J. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES § 1206 (4th ed. 1916):

> *General damages; considerations upon which based.* There is no legal measure of damages in actions for these wrongs. The amount which the injured party ought to recover is referred to the sound discretion of the jury. . . . Where the publication is actionable *per se* the legal presumption of damage goes to the jury, and they, in view of the particular circumstances of the case,

This extraordinary preferential treatment of all libel and some slander plaintiffs went so far as to preclude operation of the ordinary rule that a presumption can be rebutted by the introduction of evidence on the issue.[45] However much evidence the defendant might produce in mitigation of damages, the rule was that some damage would be presumed, so at least a nominal recovery would be allowed.[46] This led to the common practice of a directed verdict on liability for the plaintiff[47]—an advantage not available in the most frequently encountered actions for negligence. In negligence actions, the plaintiff must at least establish the incontestable existence of some damage.[48]

Slander and Libel: Per Se and Per Quod

In common law pleading, the right to recover general damages meant that the portion of the writ employed for institution of the suit devoted to specification of damage, and introduced by the words "per quod," became inapplicable whenever damages were presumed.[49] To fill the void, and to signify that something had not been overlooked, the draftsmen in such cases would simply insert "per se" where the allegations of damages, headed by the phrase "per quod" otherwise would be expected.

Since allegations of special damages were still required for those instances of oral defamation which did not fall in one of the four categories, such

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are required, in the exercise of their judgment, to determine what sum will afford proper reparation. [Footnotes omitted.]

C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 120 (1935):

Apart from the occasional traceable money loss recovered as special damage, damages in defamation cases are measurable by no standard which different men can use with like results.

C. MAYNE, ON DAMAGES 500 (11th ed. 1946):

Damages in this action [defamation] are so much in the discretion of the jury that no rule as to their amount can be laid down.

Note, *Libel and the Corporate Plaintiff*, 69 COLUM. L. REV. 1496, 1511 (1969): "[P]resumptive damages . . . permit an excessive, wholly speculative verdict."

45. *Developments in the Law—Defamation, supra* note 4, at 887; 9 J. WIGMORE, EVIDENCE § 2491 (3d ed. 1940).

46. *See, e.g.*, A. WILSHERE, PRINCIPLES OF THE COMMON LAW 398 (5th ed. 1944):

[A] plaintiff may therefore recover general damages without proving that he has in fact suffered any actual damage, and the fact that he had a bad reputation which could not be made worse is no answer to the action. But the defendant may, in mitigation of damages, prove the bad general reputation of the plaintiff . . .

HANDBOOK 762, n.21; RESTATEMENT OF TORTS § 559, comment *d* at 141 (1938).

47. *See, e.g.*, Gambrill v. Schooley, 95 Md. 260, 264, 52 A. 500, 506 (1902).

48. *See, e.g.*, Peroti v. Williams, 258 Md. 663, 669, 671, 267 A.2d 114, 118, 119 (1970). *See* HANDBOOK 143.

49. In all libel actions and in the four special categories of defamation if the case was one for spoken words.

slander was referred to as slander "per quod"; slander in any of the four categories was expectably then called slander "per se." In this usage, there was no connection whatever with the question of whether the insulting words were clearly defamatory. If words had an innocent or ambiguous meaning, and so required allegations[50] of extrinsic facts to show that a defamatory connotation was intended and understood, once sufficient allegations of that nature were made the slander was "per se" if within one of the four categories, "per quod" if it was not. On the slander side of the fence, this has remained established, and reasonably free from confusion up to the present.[51]

On the libel side, however, things have not been so simple. As we have seen, there was no call for any distinction between situations where damages would be presumed and situations where special damages would have to be proven. It would have sufficed to refer in judicial opinions to "libel" alone, and to add no qualifying phrase whatever.[52] At the same time, all libel was actionable *per se* without proof of special damages.

In all events, it was not long before the usual phrase employed to describe any written words held to be defamatory was "libel per se." Even then, all would have been well, had not the natural preference for symmetry caused the judges to create a pure figment which they labelled "libel per quod."

There was libel "per se," was there not? Surely, had not the learned judge just held that the defendant's language declared on by the plaintiff fell into that very category? And if slander "per se" was balanced by slander "per quod," all logic dictated that there must be a libel "per quod," as well.[53] But a libel "per quod" could not, the courts said, be something with which they had to concern themselves in each such case, because no special damages had been pleaded. So, in case after case it was said that exploration of

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50. HANDBOOK 748; RESTATEMENT OF TORTS § 563, comment *f* at 149-50 (1938).

51. *See* Henn, *supra* note 5, at 31, 48-49; HANSON, *supra* note 5, at 24. *But see* American Stores Co. v. Byrd, 229 Md. 5, 12-13, 181 A.2d 333, 337 (1962), where the court flirted with, but escaped making, a determination that for slander, whether words are actionable "per se" depends on whether the defamation is evident from the words alone.

52. Note, *Libel—Special Damages*, 33 N. CAR. L. REV. 674, 675-76 (1955): "As libel was not divided into classes which required proof of special damages and classes which did not, there was no place in the law for such a corresponding phrase as 'libel per se.' "

53. *See* Henn, *supra* note 5, at 22: "To distinguish 'libel *per se*' from that which is not 'libel *per se*', many courts, on the basis that slander *per quod* was the alternative to slander *per se*, began to think of libel other than 'libel *per se*' as 'libel *per quod*.' "

any question of a recovery "per quod" was not called for, the requisite allegations of special damages being wanting.[54]

None of these cases, of course, held that there was such a thing as a libel "per quod," or made any attempt to describe or define it. It was just as if a zoologist, examining aquatic specimens, were to keep concluding that each one was not a Loch Ness monster, because it did not breathe fire. Such repeated statements would scarcely constitute scientific proof that a Loch Ness monster in fact exists.

In discussing the genesis of the imaginary beast—the "spurious libel *per quod*"—Mr. Eldredge has asserted that the judges really had an existing creature in mind, but that it was of a different family. He would identify their "spurious libel per quod" with the species "injurious falsehood."[55] Dean Prosser rejoined that the judges were talking about one thing—libel—and should not be supposed to have been so careless of language as to have intended something else.[56] It would, indeed, appear incorrect to suppose that "libel per quod" was a confused reference to "injurious falsehood" —even though the presence of that tort of similar conformation in the legal menagerie may have contributed to the easy, uncritical, almost sub-conscious assumption that there was a libel "per quod."

The reason that libel "per quod" cannot be equated to injurious falsehood has to do with the earlier discussed phenomenon, peculiar to defamation, of the presumption of falsity. Where judges have alluded to libel "per quod," they have not suggested that the plaintiff would have the burden of proof on the issue of whether the words were true or false. In the case of slander "per quod," it is perfectly well established that the falsity of the words and resulting provable damage to the plaintiff do not alone make out the essential ingredients of the tort. The words must also be derogatory and, if they are, falsity is presumed.[57]

Mr. Eldredge's attempted equation of libel "per quod" to injurious falsehood would eliminate any significant role for the defamatory character of the language. Indeed, it would altogether eliminate any reason to speak

54. Eldredge 735, 738.

55. *Id.* at 735, 738, 750. The term of art "injurious falsehood," as the commentators have applied it, is restricted to falsehoods which injure, but which are not defamatory.

56. Prosser II, at 1637.

57. GATLEY, *supra* note 39, at 146: "No action for libel or slander will lie for words whch are not defamatory, even though they are followed by special damage." HANDBOOK 740, 798; Kelly v. Partington, 5 Barn. & Ad. 645 (K.B. 1833); *see* Terwilliger v. Wands, 17 N.Y. 54, 61 (1858); Wilson v. Cotterman, 65 Md. 190, 196-97, 3 A. 890, 891 (1886). *See also* Bottomly v. Bottomly, 80 Md. 159, 30 A. 706 (1894); Cairnes v. Pelton, 103 Md. 40, 63 A. 105 (1906).

of slander "per quod," since the rationale should equally apply to equate it to injurious falsehood too. If slander "per quod" were thus removed from the scene, the very foundation for any use of "per se" and "per quod" to signify distinctions in the libel and slander area would be eroded away, and we should be left with something called libel "per quod" which could not even achieve the dignity of a figment. It would at best amount to a mere naked chimera.

So it seems that, whatever existence is to be allowed to libel "per quod" must be in its defamation guise, and not on the basis that it is really a misnomer for injurious falsehood. This conclusion is reinforced by the subsequent developments, by which the figment grew into a fiction—a fiction employed for defamation cases, not for those falling within the injurious falsehood category. The evolution of the fiction was the product of two factors. The first was the combination of passage of time during which familiarity with the common law approach to defamation waned[58] and an increased pressure of litigation volume which forced courts to spew out opinions without always engaging in searching analyses of all the precedents.[59] The second was judicial disinclination to allow recovery in the absence of a showing that the plaintiff had actually been harmed.

Maryland Case Law

To demonstrate how it all came about, Maryland decisional law is worthy of review because it is typical of most of the American jurisdictions in its dealings with the issue of the necessity of allegations and proof of damages where extrinsic facts are necessary to establish the libelous character of words sued on. The early Maryland cases, while not directly presenting the question, unequivocally accepted the proposition that written defamatory words were actionable "per se," even if an inducement had to be pleaded

58. In Maryland, for example, defamation cases almost disappeared in the 1930's and 1940's. After deciding, on January 10, 1922, the case of Krymski v. Kupidlowski, 139 Md. 656, 116 A. 470 (1922), involving words in a foreign language, the next time the Maryland Court of Appeals addressed itself to a slander case was in its opinion in Domchick v. Greenbelt Consumer Services, Inc., 200 Md. 36, 87 A.2d 831 (1952).

For libel, the cases were also infrequent. Between Cobourn v. Moore, 158 Md. 358, 148 A. 546 (1930), and the 1952 decision in the *Domchick* case (in which both libel and slander were asserted), the Court concerned itself with only two libel actions. One involved solely pleading questions. Black v. Union News Printing & Publishing Co., 167 Md. 610, 175 A. 843 (1934). The other was Foley v. Hoffman, 188 Md. 273, 52 A.2d 476 (1947).

59. This doleful development was described as early as 1921 by Roscoe Pound. THE SPIRIT OF THE COMMON LAW 8-9 (1921). We would consider the conditions of which he complained far more satisfactory than the unconscionable work loads under which most contemporary judges sweat and strain.

to establish their defamatory character.[60] The same approach was taken with respect to oral defamation in one of the four categories, even though extrinsic facts had to be pleaded to establish the defamatory character of the words.[61]

Then the Court was squarely presented with the issue in *DeWitt v. Scarlett.*[62] Pointing to the fact that no special damages were alleged, and strongly intimating that the language declared upon was not defamatory on its face, the Court ruled that the libel "per se" issue was to be determined by assessing the words in light of the allegations of extrinsic facts. So judged, they were held to be libelous "per se" and actionable, despite the absence of special damage. For reasons which are not clear, neither Prosser nor Eldredge saw fit to mention this decision in their analyses of Maryland's position on the matter.

Next came *Weeks v. News Publishing Co.*,[63] where it was ruled that there were insufficient allegations of extrinsic facts to establish a defamatory meaning for the writing complained about. The opinion is explicit that, if the allegations of extrinsic facts had been sufficient, the words would have been libelous "per se."

Almost immediately thereafter, the court had before it *Stannard v. Wilcox & Gibbs Sewing Machine Co.*[64] Neither special damages nor extrinsic facts were pleaded. The holding was simply that the words contained in a letter from the defendant to the plaintiff's employer complaining of non-payment of a bill were not defamatory; while they could be expected to impair credit, there were no allegations that the plaintiff was a trader or otherwise had need for credit.[65] It is to be inferred from an approving reference to the *Weeks* case that allegations of such extrinsic facts would have made the declaration good even in the absence of any pleading of special damages. However, the opinion also distinguishes a number of cases from other jurisdictions on the grounds that there were always allegations of special damage. Properly, this is no authority in support of Prosser's position.[66] Rather

60. Newbold v. Bradstreet, 57 Md. 38, 52 (1881); Lewis v. Daily News Co., 81 Md. 466, 472, 32 A. 246 (1895); Goldsborough v. Orem & Johnson, 103 Md. 671, 681, 64 A. 36, 40 (1906).

61. Haines v. Campbell, 74 Md. 158, 162, 21 A. 702 (1891); Heyward v. Sanner, 86 Md. 19, 21, 37 A. 798, 799 (1897); Brinsfield v. Howeth, 107 Md. 278, 68 A. 566 (1908).

62. 113 Md. 47, 77 A. 271 (1910).

63. 117 Md. 126, 131, 83 A. 162, 164 (1912).

64. 118 Md. 151, 84 A. 335 (1912).

65. Fennell v. G.A.C. Finance Corp., 242 Md. 209, 218-25, 218 A.2d 492, 496-500 (1966) seems to look the other way on the question of whether credit-impairing language in a dunning letter to a plaintiff's employer is libelous. The issue is one on which the cases are in considerable disagreement. *See* HANSON, *supra* note 5, at 28.

66. Prosser cites *Stannard* for two related propositions, neither of which can be

it suggests that the court was on doubtful ground in its ruling that the words, in and of themselves, were not defamatory. The Court appears to have been stretching to find any distinction.

In any event, the opinion in *Stannard* does not mention, nor does it seek to distinguish, the recent decision in *DeWitt v. Scarlett*, which would certainly be expected if there had been any intention to introduce a contrary rule requiring proof of special damages in a libel case wherever extrinsic facts are necessary to make out the defamatory nature of the words. The conclusion that there was no such intention is reinforced by *Flaks v. Clarke* holding that, even considering the extrinsic facts pleaded, there was no defamation:

> There are no special damages alleged in the declaration, and the question to be determined is whether the publication declared on, *when read in connection with the inducement, colloquium* and innuendoes, is *per se* libellous.[67]

Then came *Bowie v. Evening News*,[68] a case in which no special damages were pleaded and in which words were held to be defamatory and actionable *per se* without regard to any extrinsic facts. In the erratic sort of warming-up to the task which is characteristic of a judge compelled to deal with a subject matter with which he is not altogether familiar, the author of the court's opinion puts forth, in the space of one page,[69] two apparently contrary dicta:

> (1) And since general damages cannot be recovered for a libel actionable *per quod* (36 C.J. 1150) it follows that if the alleged defamatory publication is actionable at all, it must be actionable *per se.*
>
> (2) It is equally a matter of law as to whether an innuendo is

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derived from it: (1) "All courts which have considered the question agree that libel which is not defamatory upon its face is actionable without such proof [*i.e.* of special damage] where the imputation is one which would make slander so actionable." RESTATEMENT (SECOND) OF TORTS 84 (Tent. Draft No. 11, 1965). *Stannard* did not even "consider the question," no more than did the other ten cases cited along with it by Prosser for the same proposition.

(2) "Twenty-four jurisdictions now hold that libel not defamatory on its face is treated like slander, and is not actionable without proof of damage where slander would not be." RESTATEMENT (SECOND) OF TORTS 86 (Tent. Draft No. 11, 1965). *See* Prosser I, at 844-45. This is a miscitation of *Stannard.*

Eldredge is more accurate in his handling of *Stannard,* characterizing it as a case "not involving extrinsic facts, on which plaintiff pleaded a nondefamatory . . . malicious falsehood without alleging special damages, and the court dismissed the action with statement that, where words are not 'libelous per se,' 'special damages' must be averred." Eldredge 750-51.

67. 143 Md. 377, 381, 122 A. 383, 384 (1923) (emphasis added).

68. 148 Md. 569, 575-79, 129 A. 797, 799-801 (1925).

69. *Id.* at 575, 129 A. at 799.

> good; that is to say, whether it is fairly warranted by the language declared on, when the language is read, either by itself, or in connection with the inducement and *colloquium*, if there be an inducement and *colloquium* set forth.

Although the words were deemed defamatory on their face for other reasons, the court also considered and rejected yet another defamatory meaning asserted for them by the plaintiff, concluding: "We are unable to discover anything in the inducement or the *colloquium* which could give to the words last referred to the meaning assigned to them by the innuendo."[70] The first dictum was, hardly, therefore, to be interpreted as equating a "libel actionable per quod" to one which is to be established by extrinsic facts. Rather it was only another unconsidered allusion to the symmetry-producing figment. On the basis of what the court both said and did, *Bowie v. Evening News* supports the proposition that all written defamation, if actionable, is actionable "per se."[71]

Such a reading of *Bowie v. Evening News* is borne out by the consideration that the Court next spoke on the matter through the same judge who prepared the *Bowie* opinion, and made it clear that extrinsic facts, if pleaded, would be taken into account in determining whether words were libelous "per se."[72]

Foley v. Hoffman[73] merits mention only because Messrs. Prosser and Eldredge have both alluded to it. The case involved words held to be actionable "per se." A judgment for the plaintiff was reversed for errors in rulings on evidentiary points, not on the grounds that the words were not, in and of themselves, libelous. The court's introductory statement to its discussion of the applicable law does not even make the usual assumption that there is a creature known as libel "per quod": "As the declaration does not allege special damage, it is demurrable unless the publications are libelous *per se*."[74] Bearing in mind the existence of related communication torts for which the reference to the need for special damages could correctly be

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70. *Id.* at 579, 129 A. at 801.

71. Prosser is simply wrong in citing the case for the proposition that Maryland is one of twenty-four jurisdictions which "now hold that libel not defamatory on its face is treated like slander, and is not actionable without proof of damage where slander would not be." RESTATEMENT (SECOND) OF TORTS 86-87 (Tent. Draft No. 11, (1965). *Cf.* Prosser I, at 844-45. Eldredge 751 dismisses the case on the grounds that the statement that special damages must be averred where words are not libelous *per se* is a dictum. He disdains even to cite the contrary dictum (or perhaps even quasi-holding) as in his favor.

72. Cobourn v. Moore, 158 Md. 358, 362-66, 148 A. 546, 547-49 (1930).

73. 188 Md. 273, 52 A.2d 476 (1947).

74. *Id.* at 284, 52 A.2d at 481.

made, this statement is not inconsistent with the rule that all libel is actionable without allegation or proof of special damages.[75]

The next occasion for an observation by the Maryland Court of Appeals was *Walker v. D'Alesandro*,[76] an unusual case in that the threat to freedom of speech was more to be found in the defendant's original actions against the plaintiff than in the plaintiff's bringing of the libel and slander action. The defendant, as Mayor of Baltimore, compelled the removal of the plaintiff's painting from an exhibition in a municipal museum, asserting that it was "morally objectionable," "obscene," and "indecent." The court first decided that the words were libelous "per se" as pertaining to the plaintiff and his character and not merely a criticism of the work itself. It then went on to say that, in any event, special damages were alleged, so that libel *per quod* was made out, and a demurrer to the declaration had, therefore, been wrongly sustained for that reason as well. Since "trade libel" is well recognized as being not a defamation tort, but rather a branch of "injurious falsehood,"[77] the reference to "libel per quod" is no authority to support the proposition that special damages are required to sustain a recovery for defamation-by-extrinsic-fact.[78]

Thereafter, *Thompson v. Upton*[79] reached the court. The words themselves, on their face, were held to be libelous "per se." There were other counts in which the plaintiff, out of caution, also sought to plead extrinsic facts. The court emitted a dictum that, if such facts and the innuendo explaining the meaning in their light were necessary, there could not be a libel "per se," since then the defamation would not appear from the face of the language. However, in view of the holding, the innuendoes were deemed surplusage and disregarded. The case shows a court predisposed to confusion over the application of the phrase *per se* in "libel *per se*," and, without pursuit of the precedents, inclined to convert it from an acknowledgment that all libel is actionable without proof of special damages to a description

75. The case certainly does not merit Prosser's citation of it as a holding for the proposition that "libel not defamatory on its face is treated like slander, and is not actionable without proof of damage where slander would not be." RESTATEMENT (SECOND) OF TORTS 86-87 (Tent. Draft No. 11, 1965). *Cf.* Prosser I, at 844-45. Eldredge 751, refers to the statement, and dismisses it, as a "dictum that where words are not 'libelous per se,' special damages must be averred."

76. 212 Md. 163, 180, 129 A.2d 148, 157 (1957).

77. *See* J. MAYNE, *supra* note 40, at 108.

78. Again there is no justification for Prosser's assertion that the case holds "that libel not defamatory on its face is treated like slander, and is not actionable without proof of damage where slander would not be." RESTATEMENT (SECOND) OF TORTS 86-87 (Tent. Draft No. 11, 1965); *cf.* Prosser I, at 844-45. Eldredge 751, is not quite accurate in his classification of the case as one where special damages were not alleged, or in his assessment that there was a dictum that, where words are not libelous "per se," special damages must be averred.

79. 218 Md. 433, 438-39, 146 A.2d 880, 883-84 (1958).

of words which, in and of themselves, are patently and unambiguously defamatory. Like many dicta, it was uttered without consideration of the authorities. Indeed, the only Maryland authority cited by the court is *Cobourn v. Moore* where it was clearly stated that words not defamatory in and of themselves could be rendered actionable *per se* by appropriate pleading of extrinsic facts.

The ultimate in *obiter* statements to date, in this line of authority, appeared in *Heath v. Hughes.*[80] The declaration, in a first count,[81] set forth the letter of the defendant, the background of its publication, and a conclusion of the pleader that it was libelous *per se.* The second count[82] incorporated by reference the allegations of the first count, pleaded standard dictionary meanings of the words complained of, and set out several innuendoes (frankly denominated as such by the plaintiff). It contained no allegations of extrinsic facts of any kind to show a special meaning to be ascribed to the words other than that to be derived from the four corners of the defendant's letter.

The court concluded that the words, viewed in and of themselves, were not defamatory. That disposed of the first count, and should properly have disposed of the second count, too. Instead, the court, although the matter had not been briefed by either side, chose to regard the second count as an allegation of libel "per quod," and purported to dispose of it on the grounds that no special damages were alleged and proven. Whatever the court thought it meant by the term "libel per quod," it is clear from examination of the record that it did not mean "libel-by-extrinsic-fact." It is remarkable that neither party cited in his brief the case of *Dewitt v. Scarlett,* which holds that libel-by-extrinsic-fact is actionable "per se." Nevertheless, the court found the case and purported to rely on it in constructing a statement which could be taken to mean that Maryland requires proof of special damages wherever the libelous character of words is not evident upon their face.[83]

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80. 233 Md. 458, 197 A.2d 104 (1964).

81. Joint Record Extract at E 2-3 Heath v. Hughes, 233 Md. 458, 197 A.2d 104 (1964).

82. *Id.* at E 3-5.

83. *See* 233 Md. at 463-64, 197 A.2d at 106-07:

> Appellant was not entitled to recover under Count II of his declaration, charging libel *per quod.* It is well settled that if the language used is not defamatory *per se,* the plaintiff is required to allege and prove that special damages resulted from the publication. . . . In this case there is neither allegation nor proof of any special damages. Thus if the alleged defamatory letter is actionable at all, it must be actionable *per se.* Whether the words used were in and of themselves actionable is a question of law. . . .
>
> . . . .
>
> . . . We think that the letter, while it may have been imprudent, does

Prucha v. Weiss,[84] was the next occasion for the court to speak *obiter* on the subject. The court affirmed a denial by an equity court of a petition for injunctive relief against publication of an alleged libel. The case was disposed of on the established grounds that equity jurisdiction was lacking, even assuming that the words were defamatory. As a buttress to the decision, the court added a conclusion that the words were not libelous anyway. It stated that they were not libelous *per se* since not defamatory on their face. It continued:[85]

> Nor do the so-called *colloquium* and *innuendo* establish libel *per quod* since the extrinsic evidence contained therein is insufficient to create a defamatory meaning. . . .

Obviously this aspect of the case was only lightly considered, no cases, from Maryland or elsewhere, being cited. Once again the existence of the "libel per quod" creature was assumed in a situation where it was found, in actuality, not to be present.

Then came *M. & S. Furniture Sales Co. v. DeBartolo Corp.*,[86] as Janus-headed as any case in this line. A landlord padlocked a tenant's premises. The parties and the court assumed that, if defamation resulted, it was libel rather than slander. The court first stated:[87]

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not on its face impute a want of integrity or capacity and thus was not actionable *per se*.

Eldredge 750-51, correctly catalogues Heath v. Hughes as a case not involving extrinsic facts in which the words were construed to be non-defamatory and the court dismissed the action with a statement that, where words are not "libelous *per se*," "special damages" must be averred. Prosser, somewhat surprisingly, does not claim Heath v. Hughes as an authority in support of his position.

84. 233 Md. 479, 486, 197 A.2d 253, 257 (1964), *cert. denied*, 377 U.S. 992 (1964).

85. 233 Md. at 486, 197 A.2d at 257. Interestingly, in this instance, nothing was made of the lack of averments of special damage. The case was brought by candidates to enjoin election-related publications. By the time the case reached the court of appeals, the election was over, and loss of the office may have been considered, in the recesses of the court's collective mind, as special damage. It is questionable whether such an item is an appropriate element of special damage. *See* 4 J. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES § 1215 (4th ed. 1916): "It has been said that injury to the political prospects of the plaintiff and his opportunities to secure public offices are not too remote and uncertain, a view which may be doubted with all due respect to the court." [Footnote omitted.] The authorities bear out Sutherland. *See* Note, *Avoidance of an Election or Referendum when the Electorate Has Been Misled*, 70 HARV. L. REV. 1077, 1093 (1957).

86. 249 Md. 540, 241 A.2d 126 (1968). Two years previously, the court had suddenly realized that the issues surrounding the phrases "libel per se," "libel per quod," and "libel-by-extrinsic-fact" were alive, complicated, and unresolved. In a case not concerned with those questions, it stated:

> We shall not have to venture very far into the thickets of the law of libel to find support for our decision. Anyone interested in learning just how tangled and how nearly impassable the underbrush really is need only observe the controversy now raging between Dean Prosser and Mr. Eldredge.

Fennell v. G.A.C. Finance Corp., 242 Md. 209, 218, 218 A.2d 492, 496-7 (1966).

87. 249 Md. at 544, 241 A.2d at 128.

> It would seem therefore that actions or conduct as well as spoken or printed words could be actionable *per se* or *per quod.* The distinction is based on a rule of evidence and the difference between them lies in the proof of the resulting injury. In the case of words or conduct actionable *per se*, their injurious character is a self-evident fact of common knowledge of which the court takes judicial notice and need not be pleaded or proved. In the case of words or conduct actionable only *per quod*, the injurious effect must be established by allegations and proof of special damage and in such cases it is not only necessary to plead and show that the words or actions were defamatory, but it must also appear that such words or conduct caused actual damage.

However, the court further asserted that, even considering the surrounding circumstances pleaded by way of inducement, "the conduct of the landlord as alleged in the innuendo was susceptible of more than one meaning and for that reason could not be considered actionable "per se."[88] *Dewitt v. Scarlett* was distinguished on the grounds that, here there was no allegation of peculiar circumstances which would ascribe to the conduct of the landlord the particular meaning attributed to it by the tenant.

Up to this point, the decision is unexceptional, and consistent with the holding of *DeWitt v. Scarlett* that libel *per se* may be made out by proper allegation of extrinsic facts. Again, however, the fatal propensity to say more than is necessary led to expressions which muddy the waters:[89]

> Even if it is assumed that the conduct was such as would support the meaning attributed to it in the innuendo, the question as to whether third parties so understood it would be for the jury, . . . but since the conduct was not defamatory *per se* (that is not necessarily defamatory considering all the circumstances), the settled rule in this state that special damage must be alleged and proved comes into play. . . . Since a court may not infer damage as a result of this conduct, the application of the rule requiring its allegation is clear. . . .
>
> As special damages were not pleaded, the demurrer was properly sustained.

Inasmuch as any extrinsic facts pleaded to establish a definite, unambiguous defamatory meaning for words not patently defamatory on their face may not be proven to the jury's satisfaction, this *obiter* statement constitutes a direct contradiction of the principle recognized in the holding that words rendered defamatory by attendant circumstances may be libelous "per se."

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88. *Id.* at 545, 241 A.2d at 128.
89. *Id.* at 546, 241 A.2d at 129.

It is difficult to accept, in light of such a meandering exposition, the conclusion of Dean Prosser that courts, in their statements that special damages are required for recovery in a libel-by-extrinsic-fact situation, have known exactly what they were doing.[90]

The latest indication of the views of the Maryland court on the subject is an enigmatic one achieved by non-expression. *Werber v. Klopfer*,[91] involved ambiguous words capable of both a defamatory and a non-defamatory meaning. No special damages were pleaded or proven. Nor were extrinsic circumstances proven to show that the defamatory meaning was intended and understood. The proof, indeed, was to the contrary. In reversing a judgment entered on a jury verdict for the plaintiff, the court rested its decision on its determination that, under all the circumstances, the words were not defamatory. One judge dissented on the grounds that the question of whether the words actually libeled the plaintiff was one for the jury, not for the court.[92] Since the decision was not rested on the proposition that special damages must be shown where extrinsic facts are needed to render words clearly defamatory, it may be inferred that the court has not finally opted for that rule.[93]

The truly remarkable aspect of the *Werber* decision is the majority's bald assertion of a proposition completely antagonistic to the rationale behind presumed general damages—that defamation always occasions some loss of reputation, even though it may not be practical to adduce evidence to prove it:[94]

> We understand it to be conceded that Klopfer's reputation was not adversely affected. Indeed his counsel has agreed that 'there is no proof of any specific or out-of-pocket damages.'

90. Prosser I, at 849.

91. 260 Md. 486, 272 A.2d 631 (1971).

92. In taking this position, the dissenter appears to have departed from the teaching of the cases. Walker v. D'Alesandro, 212 Md. 163, 179, 129 A.2d 148, 157 (1957); Goldsborough v. Orem & Johnson, 103 Md. 671, 680-81, 64 A. 36, 40 (1906); Negley v. Farrow, 60 Md. 158, 178-80, 45 Am. R. 715 (1883); Bowie v. Evening News, 148 Md. 569, 575, 129 A. 797, 799 (1925).

93. Interestingly, in all the Maryland cases bearing in any way on the question of whether special damages are an essential element of an actionable libel, no allusion is made to a statutory provision which would appear to represent an acknowledgment by the legislature that all libel is actionable without proof of special damages. Article 75, § 14, Subsections (34) and (35) of the ANNOTATED CODE OF MARYLAND (1969 Replacement Volume), set forth acceptable forms in which plaintiffs may state causes of action. The form for slander includes an example of how to proceed "if there be any special damage." The form for libel contains no such provision.

94. 260 Md. at 488-89, 272 A.2d at 633. Prosser I, at 851, explains the rationale of general damages as "the likelihood, in the particular case, that serious and major damage has in fact occurred but cannot be proved." *Cf.* RESTATEMENT OF TORTS § 621 (1938), comment *a*, at 314: "Indeed, in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed."

Thus have the judges of one jurisdiction, which appears to mirror the situation in most of the American states, floundered in the morass. It is only a guess, but it appears likely that, if the issue actually is presented for decision, the 1910 holding in *DeWitt v. Scarlett* will give way to the contrary dicta in the recent cases.

Having reviewed the trials and tribulations of Maryland's highest court in its dealings with what appears to be a simple choice between two easily distinguishable alternatives, what is the proper conclusion to draw? Fully discounting for the stumbling gait of jurists in unfamiliar, infrequently travelled country, for their lack of close acquaintance with the language of the locality, and for their tendency to seize too quickly upon the most apparent meaning for words of art, it is still an oversimplified explanation to say that they were merely inept or confused.[95] Rather there was a substantial lodestone in the vicinity which kept deflecting the compass.

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95. Mr. Eldredge, in accepting that explanation (Eldredge 736, 739, 743) has demonstrated only that he preferred the alternative which was early adopted in England, even though that was certainly in another country, and without regard to whether the wench is dead. For him the priority in time seems to have been enough. He assumes the first rule that was expressed must have been the right one, and, on that basis, he has no difficulty in showing that any deviation, *ex hypothesi,* must be wrong and the product of confusion. But such assuming of the answer is not proof that it is correct and ignores the significant question of why so many judges have so persistently gone wrong at least in what they have said, if not in what they have done.

Dean Prosser, on the other hand, goes to the other extreme. He counted so many noses from which had issued statements contrary to the teachings of precedent, that most treasured of guides on most judicial journeys, that he concluded (Prosser I, at 849) that, since all judges could not be simpletons, they must have intelligence of something they were loath to articulate, not because they were unaware of it, but because of some self-imposed stricture of the opinion-writers. He thereupon set out to construct logical reasons to support the "new rule," explaining that the libel is incomplete and so less harmful when extrinsic facts need to be known to the reader to render it defamatory. Prosser I, at 849; HANDBOOK 763; RESTATEMENT (SECOND) OF TORTS 89, 95-96 (Tent. Draft No. 11, 1965); Prosser II, at 1646; RESTATEMENT (SECOND) OF TORTS 44, 48 (Tent. Draft No. 12, 1966). However, his explanations, while perhaps of some weight if certain assumptions are made and only some of the imaginable factual situations are to be covered, fail to deal with cases for which equally likely, but different, assumptions may be made. A writing containing words which of themselves defame, he asserts, is much more apt to do continuing harm than one whose libelous character is only made apparent by reference to extrinsic facts not contained in the writing. Yet, Prosser says nothing about the failure of the rule he extracts from the cases to modify itself when, under the facts of a particular case, the probabilities are otherwise. *See* Note, *Defamation—Libel Per Quod and Special Damage,* 45 N. CAR. L. REV. 241, 245 (1966).

Thus, Prosser ignores the important test for a sound common law rule of whether it partakes of the genius of that legal system for accommodating itself on a case-by-case basis to each differing fact situation and for avoiding application of a rule when the justification for its existence is not present. *Cf.* Note, *Libel Per Se and Special Damages, supra* note 4, at 742-43: "The injury may be as great where the defamation is latent as where it is patent. . . . It would seem more rational to adjust for varying injury in the assessment of damages, according to the circumstances of the individual case."

Reassessment of the Authorities

As one examines the language of the cases, it becomes clear that the focal point for the occasional holdings and frequent *obiter* statements on which Dean Prosser places reliance is the absence of allegations or proof of special

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Dean Prosser cannot, arguing the "new rule," satisfactorily justify its existence when one, say, contrasts (a) a letter, containing an explicit, brutally defamatory reference to the plaintiff which is destroyed by the addressee after he alone has read it with (b) an apparently innocent, widely circulated newspaper article which reports the birth of a child to a married couple, when 50% or more of the subscribers know the supposed husband is a priest bound by an oath of celibacy. Interestingly, he recognizes that the essentially same distinction as between an action on a narrowly circulated writing and one on a widely heard slander "never has made any sense whatever." Prosser I, at 851. Yet, his "explanations" would force us to accept the preposterous conclusion that the risk of harm from the former publication is, in absolutely every case, of a magnitude distinctly greater than that attendant upon the latter.

Nor will the cases stand still for Dean Prosser long enough to be harnessed into the cart-shafts into which he would fit them. To get around the awkward fact that too many of the cases do not apply the rule that, if extrinsic facts are needed to make out the libel, special damages must be shown, Dean Prosser advances the proposition that the rule is restricted to libel cases involving the residual defamation classifiable as general degradation because it does not fall in one of the four slander "per se" categories of (a) charge of crime, (b) accusation of loathsome disease, (c) assertion of unfitness to perform a trade or profession, and (d) imputation of female unchastity.

However, that "modification" of the rule will not bear close inspection. In the first place, it is a professorial attempt to explain results, not a distinction enunciated by the cases. The decisions cited in support of it by Dean Prosser do not recognize it. *See* note 66, *supra*. The modification was devised by commentators as the only way to reconcile several New York Court of Appeals decisions which display as little consistency as the Maryland cases. *See* Henn, *supra* note 5, at 42. It is law review generated, not case created.

Second, this explanation puts the "rule" in the questionable posture of having an "exception" which applies to more cases than the rule itself. It is a statistical fact that the great bulk of defamation cases, whether libel or slander, fall in the four categories. *See* HANSON, *supra* note 5, at 41: "A review of the cases leaves the definite impression that most defamations sued upon either accuse plaintiff of a crime or reflect upon his fitness for his business, employment or office."

This troublesome aspect of matters becomes even more disturbing when one considers the cases which Dean Prosser forces into the injury-to-trade-or-profession category without regard for other requirements which must be met if words are to fit in that category. Words may not simply "affect" the plaintiff in his trade or business, but must "prejudice" him or tend to lower his professional business or trade reputation. The words must concern a current calling and must impute misconduct or incapacity rendering the plaintiff unfit to perform faithfully and correctly, or must malign a characteristic pertinent to the qualities requisite in the plaintiff's calling. *Cf.* Prosser I, at 844; Prosser II, at 1630 with RESTATEMENT OF TORTS § 573, comment *b*, at 178 (1938); HANSON at 27-28.

For example, Prosser attempts to eliminate as an authority contrary to his position Floyd v. Atlanta Newspapers, Inc., 102 Ga. App. 840, 117 S.E.2d 906 (1960) on the grounds that a statement that a legislator opposed a bill "would clearly affect him in his office." Prosser II, at 1633. It may be doubted that the effect of the statement would, however, meet the common law test of prejudice or injury. *See also* Prosser II, at 1634 for a similar dubious attempt to classify words, complained of in Herrmann v. Newark Morning Ledger Co., 48 N.J. Super. 420, 138 A.2d 61, *aff'd on rehearing*, 49 N.J. Super. 551, 140 A.2d 529 (App. Div. 1958), as within the trade or business category. The words asserted an opposition by the plaintiff to a resolution pre-

damages. Courts are totally accustomed to the otherwise universal rule that one of the plaintiff's burdens is the obligation to show that he was hurt by what the defendant did.[96] The judges instinctively shy away from the idea of any substantial award unsupported by evidence. Apart from the feeling that arbitrariness of result is a likely consequence of putting cases to juries without standards to guide them, the courts have been troubled by the distinct inconsistency between the concept of general damages and the philosophy of the common law.[97]

The superiority of the common law has been thought to lie in its pragmatic capacity to deal with each set of facts individually, according even slight differentiations from prior similar cases their appropriate weight.[98]

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sented at a labor convention which lauded steps to terminate the employment of government employees taking the fifth amendment in inquiries into Communist activities. The court treated a charge of sympathy with Communism as libelous, apparently on general degradation grounds. As to other words complained of, and also found to be libelous which charged impropriety in use of credentials of a convention delegate, the court specifically based its ruling on the injury to the plaintiff's profession as editor of a labor newspaper. It may be deduced that the court did not rely on such a theory in finding libelous the words relating to the plaintiff's position on the resolution, for which extrinsic facts were needed to establish a defamatory meaning.

The same objection may be made to the effort in Prosser II, at 1633 to classify another Communist charge case, McAndrew v. Scranton Republican Publishing Co., 165 Pa. Super. 276, 67 A.2d 730 (1949), as an affecting-trade-or-office decision.

The looseness of the phrase "affecting trade or business" may have suited Dean Prosser's purposes, but he probably overlooked the personal dangers of so expanding the common law doctrine. He may have unwittingly risked exposing himself to a libel action by Mr. Eldredge and an unmeasured recovery of general damages for his remarks reproduced in PROSSER II, *supra* note 3, particularly the assertion that Mr. Eldredge, a lawyer, in expressing his conclusions as to what the law is, was uttering nonsense. However, such risks abound and must be taken. The author of the present article may be running a similar risk in suggesting that Dean Prosser may have published a libel. *See* Brooks v. Tichborne, 5 Ex. 929, 20 L. J. Ex. 69 (1850).

96. *See* C. MCCORMICK, *supra* note 44, at § 22, which points to the distinction between torts where proven damages are a prerequisite of any recovery, and those where some recovery is allowed, even when no damages are shown by the plaintiff. The text makes clear that, with the single exception of defamation, recovery in the latter instances is restricted to insubstantial, nominal damages.

97. The first American decision to suggest the need for special damages in a libel action unless the words are actionable "per se" is Geisler v. Brown, 6 Neb. 254 (1877). Eldredge calls it the "earliest and worst" decisions, Eldredge 739, and "outrageous." *Id.* at 755. However, as Eldredge's description of the *Geisler* case makes clear, it was one which did not involve extrinsic facts at all. Indeed, the charge of child brutality was manifest on the fact of the article. Examination of the opinion makes evident that it was the dislike for unproven damages, a belief on the court's part that pecuniary loss should be shown, even in a case of words defamatory on their face, that led to a judgment for the defendant.

98. B. CARDOZO, *supra* note 10, at 22:

> The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars.

Id. at 25:

> There has been a new generalization which, applied to new particulars,

The general damages concept virtually eliminates the drawing of distinctions based on the extent of distribution of the libelous publication, the degree of acquaintance on the part of readers with the plaintiff or his affairs, the nature of the particular defamation, and whether it attacks the plaintiff in the economic midriff or disturbs his social and other inter-personal relationships. In short, general damages are incompatible with a specific case-by-case approach, which is what judges trained in the common law expect to make.

The incompatability accounts for the magnetic pull towards dicta which ignore or confuse the teachings of earlier cases and permit word-plays to obscure reason. Or in another metaphor, the common law rejects an alien body—unmeasured, speculative damages—in much the same way that the human body acts to repudiate any foreign organ transplanted into it. The tendency whose existence has been heralded by Dean Prosser, and whose fragility as a foundation on which to construct a contemporary law of defamation has been exposed by Mr. Eldredge, should be recognized for what it is. It is not, indeed, the judicial delineation of a rule actually designed to dispose of cases, but rather a vehicle for the expression of deep-seated dissatisfaction with the entire concept of presumed, unproven, and unmeasured "compensatory" damages.[99]

The cases would be more acceptable—and more readily understood—if they frankly rebelled against an older rule which has outlived its usefulness. Instead, they avoid coming to grips with the matter; they simply apply stare decisis to allow general damages where words are libelous *per se* by any definition. Then, to compensate, they express a rule designed to constrain the unliked concept of unproven and speculative damage awards, even though the rule is not supported by precedent and is inconsistent. In doing so, the courts have demonstrated a capriciousness of result, if not of judicial intent, for many cases allowing general damages for libel "per se", are not defensibly to be distinguished from others in which the right to general damages for defamation is precluded. The question whether extrinsic facts must be shown to make out the libel is often unrelated to the extent of the demonstrable or expectable harm.

> yields results more in harmony with past particulars, and, what is still more important, more consistent with the social welfare. This work of modification is gradual. It goes on inch by inch. Its effects must be measured by decades and even centuries. Thus measured, they are seen to have behind them the power and the pressure of the moving glacier.

Id. at 102:

> This means, of course, that the juristic philosophy of the common law is at bottom the philosophy of pragmatism.

99. *See* the reference in Linn v. United Plant Guard Workers, 383 U.S. 53, 64 (1966) to "the propensity of juries to award excessive damages for defamation."

The uneasiness about permitting unmeasured and hence essentially unlimited[100] awards is no doubt heightened by the increased tendency of juries to couple awards of punitive damages in quite substantial amounts with verdicts for general damages. The concept of punitive damages has received unfavorable comment from legal pundits,[101] but it is, nevertheless, well established that a plaintiff may recover such damages in a tort action where there has been activity by the defendant over and beyond that needed to establish the tort, whenever the activity is classifiable as "malicious."[102]

The rationales advanced to support the concept of punitive damages are varied. Interestingly, though hardly surprisingly, they overlap to a great extent with those advanced to justify the concept of general, *i.e.*, presumed, unproven, damages in defamation actions.[103]

In another of those situations in which judges, largely unfamiliar with the relatively rare actions for defamation, rely on words without really going behind them to learn the extent to which they have acquired special extraordinary meanings, there has grown up an assumption, erroneous but widespread, that, where the words constitute libel "per se" the plaintiff is automatically entitled not only to general damages, but to punitive damages as well.[104] This erroneous concept arises out of the confusion over whether

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100. Sometimes there are references to the power of the court through grant of a new trial as providing some sort of limitation. However, it is palpably a very inexact control since the judges themselves are without any measuring stick for determining whether a verdict is excessive where the rule is that the plaintiff need not introduce evidence of the harm he has suffered. *Cf.* Note, *Libel and the Corporate Plaintiff*, *supra* note 44, at 1510.

101. *See* M. NEWELL, THE LAW OF SLANDER AND LIBEL § 727 (4th ed. 1924). C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 77 (1935), alludes to dislike by many judges and commentators of the concept of punitive damages, but concludes that there are some things to be said in their favor. In Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 78 (1971), Justices Marshall and Stewart would have banned punitive awards in libel actions altogether, as violative of the first amendment. Though the opinion in which those views were expressed was described as a dissenting opinion, this aspect of it in fact was fully compatible with the majority decision that the plaintiff should not recover either the "compensatory" general damages of $25,000 or the punitive damages of $725,000 (reduced by remittitur to $250,000) awarded by the jury.

102. *See, e.g.*, Heinze v. Murphy, 180 Md. 423, 429, 24 A.2d 917, 921 (1942): "The allowance of exemplary damages must be justified by circumstances of aggravation. A wrong motive must accompany the wrongful act, and without proof of malice or some other aggravation, exemplary damages cannot be recovered." *Cf.* C. MCCORMICK, *supra* note 44, at § 79.

103. *See* Justice Marshall's observation in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 83 (1971) that the effect of permitting an award of general damages "is to give juries essentially unlimited discretion and thus give the jury much the same power they exercise under the labels of punitive or exemplary damages." *Cf.* note 41 *supra*.

104. 1 F. HARPER & F. JAMES, *supra* note 4, at 469 n.10: "It is even held, by some cases, that in the absence of proof of lack of malice, the unprivileged publication of matter which is actionable per se will support a verdict for punitive damages." *See* Coffin v. Brown, 94 Md. 190, 198, 50 A. 567, 570 (1901); Shockey v. McCauley,

malice is an ingredient of defamation. Those who have given careful consideration to the matter generally recognize that there is no requirement of malice as part of a plaintiff's case unless the words were uttered in circumstances which will support a defense of privilege.[105] However, busy judges are misled by the ancient rigamarole by which the early common law courts eliminated the original requirement that malice be shown as part of a defamation action.[106] Instead of frankly excising the requirement, the common law judges pretended that it remained, but held that, absent privilege, it would be conclusively presumed in any case where the words were actionable.[107]

Although the notion that punitive damages are awardable in all cases of unprivileged defamation is demonstrably erroneous, it pervades the judicial atmosphere. It is, consequently, a silent but significant factor generating even greater unwillingness on the part of judges to allow words to be classified as actionable "per se." There is something to be said for a reluctance to permit a situation in which a jury is instructed, on the one hand, to bring in a verdict for "general compensatory damages" measured only by their personal views as to the value of a reputation, and then, on the other hand, instructed that it may add a second award for "punitive damages" also based on their whim.

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101 Md. 461, 462, 61 A. 583-84 (1904); Simon v. Robinson, 221 Md. 200, 208, 154 A.2d 911, 916 (1959). *But see* Gambrill v. Schooley, 93 Md. 48, 65-6, 48 A. 730, 733 (1901), 95 Md. 260, 287, 52 A. 500, 507 (1902); Prucha v. Weiss, 233 Md. 479, 484, 197 A.2d 253, 256 (1964), *cert. denied,* 377 U.S. 992 (1964); Damazo v. Wahby, 259 Md. 627, 638, 270 A.2d 814, 819 (1970).

105. HANSON, *supra* note 5, at 22, 25; ODGERS, *supra* note 34, Preface at xi. There are, however, frequent unconsidered statements to the contrary. *See, e.g.,* Heyward v. Sanner, 86 Md. 19, 22, 37 A. 798-99 (1897) ("malice express or implied is a necessary ingredient . . . ."); Pulvermann v. A.S. Abell Co., 131 F. Supp. 617, 623 (D. Md. 1955) *aff'd,* 228 F.2d 797 (4th Cir. 1956) ("Thus malice, either actual or imputed, becomes the gist of every actionable libel.").

106. Malice was considered a prerequisite of jurisdiction for the ecclesiastical courts. Veeder, *The History and Theory of the Law of Defamation II,* 4 COLUM. L. REV. 33, 35 (1904). When the common law courts took over the tort they were faced with malice as an established ingredient.

107. Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 661 (D.C. Cir. 1966):

> Punitive damages were granted by the District Court, which ruled that malice is implied from the fact of publication of a falsehood. At one stage in the evolution of the common law of defamation, the action was not maintainable except upon a showing of wrong motive, *i.e.,* malice. Later, liability was extended even in the absence of intention to defame the plaintiff. A legal fiction was employed; the requirement that malice be pleaded was retained, but malice was said to be presumed from the fact of publication. This language is misleading; what is really meant is that malice is not required for the basic defamation action. Due to a misunderstanding of the fiction of implied malice some courts have ruled it sufficient as a basis for award of exemplary or punitive damages. We do not agree.

Cf. Green, *Slander and Libel, supra* note 41, at 597.

A Suggested Rule

Thus, the authorities are in a rather amorphous state. It remains to cull from them the underlying real rule of law which has been adhered to, if not expounded. It is submitted that the rule to be fashioned from the American authorities is that presumed, unproven damages are inconsistent with the basic concept of tort law and should be eliminated, whether in cases where the defamatory import of words is evident from their face or in cases where extrinsic circumstances must be shown to establish a defamatory connotation.[108]

This conclusion should not be dismissed as merely another effort by the defense-minded to restrict recoveries.[109] The recognition of the rule that, in addition to nominal damages, only measurable dmages may be recovered should be accompanied by several beneficial consequences for plaintiffs. In the first place, the inherent dislike for a rule permitting recovery of unmeasured general damages has led courts to be unduly restrictive in the decisions as to what may be classified as provable damages and in the requirements as to their pleading and proof.[110]

Moreover, if the plaintiff in every defamation action must prove all elements which constitute his damages, there is no longer any reason to im-

108. An American court willing squarely to face the question of whether general damages are appropriate, even in the case of words libelous on their face, would have an easy time in distinguishing the English authorities. Without regard to the changes wrought by the passage of time since the doctrine of general damages was first enunciated, there are two significant differences between English and American practice which should suffice. In England, a plaintiff faces two obstacles not confronted by his American counterpart. He must be prepared to pay his counsel, even if he loses, since the contingent fee is not permitted. He must, also, pay his opponent's legal expenses if he loses. *See* Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 VA. L. REV. 867, 869 n.3 (1948): "In England, however, a judgment for costs includes attorney's fees and for this reason a libel suit is a hazardous undertaking." The concept of general damages can be described as a judicially contrived counterbalance to those inhibitors of plaintiffs with reasonable cases. Since the inhibitors are not present in America, the counterbalance should not be available in this country either.

The resulting adjustment in the law would have the further justification that it would terminate the anomaly, peculiar to the common law, of a differing treatment for oral and for written defamation. The distinction is generally excoriated. *See, e.g.*, Prosser I, at 839; Grein v. LaPoma, 54 Wash. 2d 844, 340 P.2d 766 (1959). The anomaly exists only because general damages are allowable for some defamations, not for others. Elimination of the right to recover general damages would end the anomaly.

109. Prosser, in discussing the possibility that proof of special damage be required for all defamation actions, points out that the suggestion has been popular with publishers. He expresses doubt, however, that it will ever be adopted. Prosser I, at 852. *Cf.* Paton, *Reform and the English Law of Defamation*, 33 ILL. L. REV. [now NORTHWESTERN L. REV.] 669 (1939), adverting to proposed legislation which would have required proof of actual damage as "put forward by a Press Union and not by an association for the protection of the reputations of private individuals."

110. *See* note 4 *supra*; Dicken v. Shepherd, 22 Md. 399 (1864); DeWitt v. Scarlett, 113 Md. 47, 77 A. 271 (1910).

pose stricter requirements for pleading and proof of damages than those established for other tort actions. Particularly, if the plaintiff can demonstrate that he has been put to "pain and suffering" as a result of knowing that others have heard or read the derogatory statements about him, the pain and suffering should be recognized as special damages. The proof of such elements of damage should pose no more problems than those encountered with respect to similar items in the typical personal injury litigation.[111]

Moreover, it seems realistic for the courts to give serious consideration to recognizing reasonable counsel fees as a recoverable element of damages for a successful plaintiff in a defamation action. Despite the general rule that the prevailing party's counsel fees are not to be awarded,[112] it is most unrealistic to suppose that defamation case juries have not, when fixing general damages, tried to insure that the plaintiff is not left with a lawyer's fee to pay, but no source from which to meet it.[113] Told that it should fix such amounts as it thinks appropriate, without any standards besides its own opinion of what is proper, a jury could hardly be expected to fail to grasp

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111. This solution has been called "quite impracticable," but the reasoning for the conclusion appears to constitute a *non sequitur*. *See* Veeder, *supra* note 106, at 53:

> Yet to extend the protection of the law in such cases by changing the definition of special damages would be quite impracticable. To say that mental distress and loss of the opinion of others, with consequent exclusion from society, should be sufficient special damage to support an action, would be in effect to say that all slanders should be actionable.

The *non sequitur* seems all the more evident when, within the space of a page, the author advocates the assimilation of slander to libel, *i.e.*, making all oral defamation actionable "per se." *Id.* at 54.

Another commentator takes a contrary view, expressing regret that the common law did not realize possibilities inherent in the action of defamation for construing special damage as including "other kinds of loss besides mere pecuniary loss." Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries II*, 40 L.Q. REV. 397, 403-04 (1924).

Holdsworth has the better of the argument. The restriction of proof of special damages to "pecuniary" loss came about because the church courts had jurisdiction generally over defamation, and the common law judges could, at first, only assert jurisdiction to make the pecuniary awards which the ecclesiastical courts were without power to make. The church courts vanished altogether from the scene in the Nineteenth Century. *See, e.g.*, PLUCKNETT 197. This jurisdiction to compel amends for emotional distress and loss of society caused by defamatory utterances should not have been allowed to go unexercised. Otherwise, plaintiffs with acknowledged rights were without remedies. The common law should have assumed the last vestiges of power which had earlier been left in the church courts, when those courts closed their doors.

112. C. MCCORMICK, *supra* note 44, at § 77 calls the denial of counsel fees as costs "one of the glaring defects in our system."

113. A libel case defendant, according to the authorities, is entitled to an instruction that reasonable counsel fees should not be included in any award of general damages . *See, e.g.*, Sutherland, *supra* note 44, at 4516. However, it is the rare and intrepid defendant who would request such a charge, bearing in mind the wise rule that one interested in preventing nasal obstructions avoids telling a child: "Don't put a bean up your nose."

this one firm basis for measurement of its award. It would not mark a departure from the actual results of prior cases to acknowledge that juries have taken into account the considerable legal expense involved in obtaining a judicial vindication of the plaintiff's reputation.[114]

The most persistent argument advanced for the concept of general damages has been that, absent such damages, there would be no effective way for the defamed plaintiff to gain the relief of vindication.[115] While a judicial decision that the words are defamatory may achieve that purpose, if only nominal damages are recoverable, the certainty of large legal expenditures which cannot be recouped will deter most plaintiffs.[116] The knowledge that general damages might be recovered, which would go to satisfy counsel fees, has at least served the worthwhile purpose of removing this unreasonable stumbling block in a deserving plaintiff's path.

In this connection, it is significant that defamation actions serve a dual public purpose. Not only do they enable the individual litigants to put the problem behind them and get on with their lives; they also spare the body politic the adverse consequences of violent self-help which, in the absence of an effective judicial remedy, a person defamed may be expected to employ.[117] The existence of such an independent public purpose behind the

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114. A recent Note, *Libel and the Corporate Plaintiff*, *supra* note 44, at 1510, argues that the purposes ostensibly served by awarding general damages are more rationally and better accomplished by an award candidly labeled as punitive damages. With this approach, counsel fees would be recoverable since they have come to be recognized as a proper element of punitive damages. *See, e.g.*, Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 662 (D.C. Cir. 1966); C. MCCORMICK, *supra* note 44, at § 85.

115. *See, e.g.*, Eldredge 755-56; Introductory note to RESTATEMENT OF TORTS at 323-24 (1938); *id.* § 569, comment *b*, at 166; T. STARKIE, PRELIMINARY DISCOURSE TO TREATISE ON THE LAW OF SLANDER AND LIBEL at xxvi-xxx (2d Am. ed. 1852); Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 660 (D.C. Cir. 1966).

116. *See* Arkin & Granquist, *supra* note 15, at 1484, where it is pointed out that a plaintiff who has been blatantly libeled will nevertheless be "unwilling to undertake expensive litigation when the chances of a substantial recovery are slight."

117. The established theoretical foundation for the tort of libel is that "libels are punishable . . . because they provoke a breach of the peace." PLUCKNETT 490. The author continues: "This was by no means a fictitious or merely technical justification; the great vogue of the fashion of duelling at this moment seems to have given cause for great concern to the government." While duels in their formal guise have disappeared, the human instincts which fostered them are still with us, and could be expected to find similar violent means of expression in the absence of a viable alternative. *Cf.* T. STARKIE, *supra* note 115, PRELIMINARY DISCOURSE at xxix: "Experience has fully proved that to refuse, or even to restrict the civil remedy within too narrow limits, is sure to occasion personal conflicts and bloodshed; the ordinary transition is *a verbis ad verbera*, men being always apt to carve out their own remedy in such cases where it is denied by the law."

See also Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 660 (D.C. Cir. 1966):

> The allowance of nominal damages performs a vindicatory function by enabling the plaintiff to brand the defamatory publication as false. The rule that permits satisfaction of the deep-seated need for vindication of honor is not

encouragement of institution of private law suits has frequently led to legislative enactments making legal expenses a recoverable element of damages.[118]

It is not a reasonable objection to the recognition of a right in defamation plaintiffs to recover counsel fees as part of their damages that a flood of cases with little merit will ensue.[119] A comparison of an award of counsel fees to a plaintiff in a defamation action to an award of general damages is a comparison of the part to the whole, since jurors can be expected to take the factor of counsel fees into account along with anything else they choose to consider if told to award whatever they deem appropriate. Since awards are in fact being made on that basis, it would certainly achieve greater justice for the jury to have the benefit of evidence establishing with some precision what reasonable counsel fees would be. Otherwise, the jury can only speculate and may in its determination be wide of the mark.

In short, the entire concept of unproven damages should be recognized as inappropriate. Courts, while giving lip service to the rule that general damages may be recovered, go to such lengths to avoid allowing them that they tear the fabric of the law in other places. At the same time, the definition of actual damages should be expanded to include all consequences reasonably and foreseeably flowing from the tort and not merely the re-

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a mere historic relic, but promotes the law's civilizing function of providing an acceptable substitute for violence in the settlement of disputes.

But see M. ERENST & A. LINDEY, HOLD YOUR TONGUE 325-26 (1932):

> In the first place, the breach-of-the-peace theory is, from a practical standpoint, nothing more than a myth. Vilified folk might have wielded clubs or swung axes or crossed swords in the past; they do not do so today; on the rare occasion when there is violence, it is usually—for self-evident reasons—a private and not a public matter. . . . But to maintain that today one man's gibe at another would corrupt the tranquility of a community any more than a host of other accepted causes, and would endanger property, is to talk drivel.

118. *See, e.g.*, 15 U.S.C. § 15 (1970) which permits a plaintiff suing for injury resulting from violation of the anti-trust laws to recover "the cost of suit, including a reasonable attorney's fee." Even in situations where an independent public purpose is not so readily apparent, there are many statutes which call for an allowance of counsel fees as an element of a successful plaintiff's costs. *See* C. MCCORMICK, *supra* note 44, at § 65.

Indeed, independently of statute, equity has recognized the propriety of an allowance of counsel fees to successful plaintiffs in cases where "the vindication of their rights necessarily involves greater expense in the employment of counsel to institute and carry on extended and important litigation than the amount involved to the individual plaintiffs would justify their paying." Rolax v. Atlantic Coast Line Ry., 186 F.2d 473, 481 (4th Cir. 1951); Vaughan v. Atkinson, 369 U.S. 527, 530 (1962).

Cf. the rule that litigation expenses are proper elements of actual damage in slander of title and trade libel cases. RESTATEMENT OF TORTS § 633, at 347-48 (1938).

119. Particularly would this be true if the love of symmetry were to lead to a corollary rule that an unsuccessful libel case plaintiff would have to pay the defendant's counsel fees.

stricted list of "pecuniary" items. In particular, the plaintiff's reasonable counsel fees should be recognized as appropriate elements of damage in an action where the vindication flowing from a judgment in the plaintiff's favor is the real object of most of the worthy cases.[120]

Unless common law courts and commentators frankly recognize this to be the proper rule of law, it is to be expected that the Supreme Court will assert the proposition as a matter of constitutional imperative.[121] Al-

120. While the strength of the common law has reposed in its ability to remold old concepts to meet modern exigencies, some courts may regard the proposal that counsel fees be acknowledged as an element of damages as too radical, too far-reaching to be adopted in charges to juries in defamation cases. If so, it is to be hoped that they will find in the suggestion at least a basis for judging, in considering the amounts of remittiturs to require, as alternatives to new trials, what would be appropriate maximums for general damage awards in libel and slander actions. The inadequacy of the remittitur power as a means of policing jury tendencies to award excessive verdicts has been frequently recognized. *See, e.g.*, Note, *Libel and the Corporate Plaintiff, supra* note 44, at 1510: "[R]ather than serving to compensate the plaintiff for his actual losses, presumptive damages have permitted juries to make outrageous awards, against which remittitur is but an ineffective check." A reason why remittitur has been so unsatisfactory a control has been the absence of any standards for judges to apply. *Developments in the Law—Defamation, supra* note 4, at 935-36. If the approach suggested in this article is taken, a judge might well fix the figure to which a remittitur would have to be made by adding (a) nominal damages, (b) a reasonable figure for pain and suffering comparable to awards for pain and suffering in other cases, involving possibly other torts, with which he is familiar, (c) the amount of any other provable damages for which the plaintiff has adduced proof, and (d) a reasonable amount for plaintiff's counsel fees.

121. In Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) and Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), the Court has already given strong intimations that it believes the doctrine of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), comprehends a restriction of recovery to provable damages.

Justice White has stated that a majority of the Court when Rosenbloom was decided subscribed to the view that: "In all actions for libel or slander, actual damages must be proved, and awards of punitive damages will be strictly limited." 403 U.S. at 59. *Cf.*, however, Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898 (1972) and Dun & Bradstreet, Inc. v. Kansas Electric Supply Co., Inc., 405 U.S. 1026 (1972) in both of which certiorari was denied despite large awards of general damages, and, in one case, of punitive damages. *See* Arkin & Granquist, *supra* note 15, which advocates such a rule and cites several cases which have already deduced it from the line of authorities commencing with New York Times Co. v. Sullivan: Lundstrom v. Winnebago Newspapers, Inc., 58 Ill. App. 2d 33, 36, 206 N.E.2d 525, 527 (1965); Suchomel v. Suburban Life Newspapers, Inc., 84 Ill. App. 2d 239, 246, 288 N.E.2d 172, 176 (1967); McNabb v. Tennessian Newspapers, Inc., 55 Tenn. App. 380, 390, 400 S.W.2d 871, 876 (1965). *But see* Fox v. Kahn, 421 Pa. 563, 221 A.2d 181 (1966), *cert. denied*, 385 U.S. 935 (1966); Goldwater v. Ginzburg, 261 F. Supp. 784, 788 (S.D.N.Y. 1966).

In Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 659-60 (D.C. Cir. 1966), the circumstances were not deemed such as to make the publication a matter of public interest to which the *Sullivan* doctrine would apply. The majority rejected a suggestion that, as a matter of common law, the plaintiff should be required to prove special damages. It did so, however, because "special damages," as the concept had evolved, excluded important elements of provable damages for which a plaintiff should be able to recover. The case was one where no economic loss was suffered, but the trial court sitting without a jury awarded $500 in damages to compensate for the plaintiff's disturbance and concern. The opinion suggests that the court would

ternatively, there may be Congressional action, supplanting state libel and slander law by an enactment of national applicability relying on the commerce clause as the source of Congressional power to invade yet another area traditionally the prerogative of the states.[122]

Conclusion

The origins of the concept of general damages in defamation actions are found in ancient jurisdictional struggles between the king's courts and ecclesiastical courts, and in a Star Chamber policy that, when punishing as a crime words constituting seditious libel, it would share the fine with the aggrieved private individual. Such historical antecedents have no significance in contemporary America. This is especially so where the initial development of the concept of general damages depended on a supposed connection of actions for defamation with actions for trespass, which also permitted recoveries without proof of damages. Today, recoveries of substantial compensatory damages for trespass where the plaintiff has proven no harm are not allowed, the recoveries being strictly limited to nominal damages.[123] If general, unmeasured, speculative verdicts are unavailable to trespass plaintiffs, the reason for them to be recoverable in actions for libel or slander is also gone.

Because the idea of a jury unrestrained by any standard is not congenial to common law judges, they have sought ways to constrict and compensate for it. They have indicated a preference for proof of damages by denying that a cause of action for libel has been made out when "special damages" are not pleaded and proven, if an excuse can be found for excluding the plaintiff's claim from the libel "per se" classification. To this end, they have made a play on words of considerable dimensions, to eliminate as libel "per se" any phraseology whose defamatory character depends on extrinsic circumstances, without regard to how widespread among readers of the publication the knowledge of the extrinsic facts may be. In doing so, they have

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not allow unmeasured "general damages": "But plaintiff need not show any pecuniary damage in order to establish the libel and recover *nominal* damages, or compensation for nonpecuniary damage *supported* by the proof" (emphasis supplied).

122. Such legislation is proposed in Wright, *supra* note 19, at 646-48. The suggested legislation would restrict recoveries to provable damages: "Some proof of harm must be adduced and the plaintiff can recover only to the extent he has been harmed, but harm should include any injury, from loss of associates and friends or mental distress to pecuniary or temporal damage."

123. *Cf.* C. McCORMICK, *supra* note 44, at § 22 (nominal damages are recoverable for a trespass when no damages are proven) with *id.* at § 116 ("From the fact of publication . . . the jury, without any further data, is at liberty to assess substantial damages.") *See also* RESTATEMENT (SECOND) OF TORTS § 163, comment *e*, at 295 (1965).

simultaneously given an unnecessarily curtailed definition of special damages, allowing recovery only of pecuniary loss flowing from the publication and excluding other provable items of damage, for which the courts have traditionally been able to compensate through monetary awards. In this category are especially the pain and suffering of the plaintiff from knowing that the defamation is circulating and the loss of the society of others consequent upon the publication.

In short, the courts have robbed Peter to pay Paul, soothing their conscience pangs about unjustifiably large general damage awards to some plaintiffs by unduly circumscribing recoveries of provable damages by those to whom they have, by tortured reasoning, been able to deny the joys of general damages. It makes eminent sense to suspect two such extremes, especially where one of them, at least, proceeds in part from a judicial attempt to blend two wrongs into a right. Between them lies the true rule. Neither general damages (a jury largesse masquerading as compensation) nor special damages (a recovery unduly limited to purely pecuniary loss only) should be the proper compensatory award in a libel or slander action. Instead all provable damages—all foreseeable adverse consequences shown by competent evidence to have flowed from the defamation for which the law is competent to award monetary compensation—should be the proper measure.

It is perhaps asking too much for the courts at this late date to display the talent for innovation which was the hallmark of the common law in its formative period. However, they should be prepared to do so to the extent of recognizing the plaintiff's reasonable counsel fees as a proper element of compensatory damages for defamation, especially since the probabilities are high that juries have in fact consistently included amounts to cover such an adverse consequence to the plaintiff in their awards of general damages. Since it is one of the few elements taken into account in fixing general damages for which a reliable measuring device exists, its recognition as an element of provable damages would be altogether appropriate.

When the courts adopt a requirement that only provable damages—but not all such damages—may be recovered, the ridiculed—and ridiculous—distinctions between libel and slander and the questionable difference in treatment of words libelous on their face, on the one hand, and words dependent on extrinsic facts to establish their defamatory character, on the other, will have been ended. If the state and lower federal courts excercising jurisdiction over cases involving questions of common law defamation do not limit recovery in all cases to nominal damages, except to the extent that compensatory damages are actually proven, the Supreme Court will proba-

bly compel the result by holding that presumed, unproven damages violate free speech and free press guarantees of the first amendment.

The regrettable aspects of such imposition of a rule on the several states by the highest federal court include the further erosion of the autonomy of our common law courts. It is to be hoped that the state courts and lower federal courts will act to fashion the correct rule from the precedents available—properly assessed—and thereby forestall another inroad into the concept of dual systems of law which has provided such a workable solution to the problem of balancing local and national interests in the large, complex society of twentieth century America.