Buffalo Law Review

Volume 1 | Number 2 Article 14

12-1-1951

Defamation—Written Imputations of Indebtedness Concerning Non-Trader Held Libelous Per Se

Maynard C. Schaus Jr.

DEFAMATION—WRITTEN IMPUTATIONS OF INDEBTEDNESS CONCERNING NON-TRADER HELD LIBELOUS PER SE

Defendant allegedly mailed to friends, relatives, and business associates of the plaintiff, twelve false written charges that plaintiff had long been delinquent in paying a small debt. Without pleading special damages, the plaintiff complained that the publications were libelous per se, as tending to injure her credit and reputation as an individual. Plaintiff appealed from a judgment of the Appellate Division which had reversed an order of Special Term denying a motion by the defendant to dismiss the complaint on the ground of insufficiency. *Held*: Such charges are capable of a defamatory construction and it was a question for the jury whether plaintiff was held up to ridicule and contempt. *Cyran v. Finlay Straus, Inc.*, 302 N. Y. 486, 99 N. E. 2d 298 (1951).

A false written publication is libelous per se which on its face exposes or tends to expose a person to public contempt, ridicule, disgrace or shame, *Sydney v. MacFadden Newspaper Publishing Corp.*, 242 N. Y. 208, 151 N. E. 209 (1926); or which makes a person the object of aversion, or induces an evil opinion of him in the minds of right thinking persons, or tends to deprive him of their friendly intercourse in society, or to be shunned or avoided. *Katapodis v. Brooklyn Spectator, Inc.*, 287 N. Y. 17, 38 N. E. 2d 112 (1941). See comprehensive definition in Seelman, The Law of Libel & Slander in the State of New York, Par. 18 (1933); and Prosser, Torts Sec. 91 (1941).

The ultimate purpose of the law of defamation is to redress injury to reputation. *Kimmerle v. N. Y. Evening Journal Inc.*, 262 N. Y. 99, 186 N. E. 217 (1933). A false written imputation is either libelous per se, or libelous by extrinsic fact, or it is non-libelous. Where the publication is libelous per se there is a legal presumption of damage to reputation and special damages need not be alleged. *Balabonoff v. Hearst Consol. Publishing Co.*, 294 N. Y. 351, 62 N. E. 2d 599, (1945); McCormick, Damages Sec. 113 (1935). But where the publication is libelous by reason of extrinsic facts, special damages must be alleged and proven. *O'Connell v. Press Publishing Co.*, 214 N. Y. 352, 108 N. E. 556 (1915).

It is universally accepted that false written charges which impute non-payment of debts, want of credit or insolvency to a merchant or trader or one engaged in a vocation wherein financial credit is necessary are libelous per se. *Holmes v. Jones*, 121 N. Y. 461, 24 N. E. 701 (1890), *Brown v. Trego*, 236 N. Y. 497, 142 N. E. 159 (1923). See Further 53 CJS 67; 33 Am. Jur. 78; 116 Am. St. Rep. 817, and cases therein cited. But in a majority of States, a false written statement that a person who is not a trader or merchant or engaged in a profession wherein credit is necessary, owes a debt and is unwilling or refuses to pay, without imputing insolvency, is not considered libelous per se. *M. Rosenberg & Son v. Craft*, 182

Va. 512, 29 S. E. 2nd 375 (1944). Thus, to charge a non-trader with failure to pay a just debt, or to list an individual on a delinquent debtors' list, or to impute that an individual owes a debt which he refuses to pay is not libelous per se under this rule. *Holtz v. National Furniture Co.,* 57 F. 2d 466 (D. C. Cir. 1932); *Harrison v. Burger,* 212 *Ala.* 670, 103 *So.* 842, (1925); *Davis v. Gen. Finance & Thrift Corp.,* 80 Ga. App. 708, 57 S. E. 2d 225 (1950); *Patton v. Jacobs,* 118 Ind. App. 358, 78 N. E. 2d 789 (1948). However, where the imputations go beyond charges of indebtedness or refusal to pay a debt and impute deliberate evasion in paying a debt, or dishonesty, they are libelous per se. *Cohen v. Marx Jewelry Co.,* 92 F. 2d 498 (D. C. Cir. 1937), and cases therein cited.

A few States, including New York, have held that to falsely charge an individual or non-trader with refusal or unwillingness to pay a debt is libelous per se. In *Wells v. Belstrat Hotel Corp.,* 212 App. Div. 366, 208 N. Y. Supp. 625 (1st Dept. 1925) it was considered libelous per se to charge the plaintiff with failure to pay a small hotel bill. In *Keating v. Conviser,* 127 Misc. 531, 217 N. Y. Supp. 117 (Sup. Ct. 1926), *rev'd without opinion,* 219 App. Div. 836, 220 N. Y. Supp. 874 (2d Dept. 1927), *reversal aff'd without opinion,* 246 N. Y. 632, 159 N. E. 680 (1927), a letter to the plaintiff's employer charging that she was delinquent in paying for goods purchased on credit was held libelous per se. The fact situation in *Neaton v. Lewis Apparel Stores Inc.,* 267 App. Div. 728, 48 N. Y. S. 2d 492, *aff'd mem.,* 268 App. Div. 834, 50 N. Y. S. 2d 463 (3rd Dept. 1944), was similar to that in the instant case. The defendant had sent a letter to the plaintiff's employer soliciting his assistance in the collection of an alleged indebtedness. The court rejected the contention of the defendant that the charge was not libelous per se because the plaintiff was a non-trader and had failed to allege special damages. The majority held the publication libelous per se not as imputing dishonesty to the plaintiff but as intended to depict him as an individual debtor unworthy of credit. See Note, 8 U. Detroit L. J. 36 (1944). In *Sheppard v. Dun & Bradstreet Inc.,* 71 F. Supp. 942 (S. D. N. Y. 1947), the defendant published a credit report stating that the plaintiff had failed to pay a debt as he had agreed and that he was sued as a consequence. The court measured the charge with the holding of the *Neaton* case *supra* and ruled that the publication was libelous per se. However, a false charge that one is in mere default on a debt has not been held libelous per se. *Douglas v. Weber,* 106 Misc. 338, 174 N. Y. Supp. 486 (Sup. Ct. 1919). See Note, 3 A. L. R. 1590 (1918).

Other States in concurring with New York in this minority view have held it libelous per se to placard a non-trader in an attempt to collect an alleged indebtedness by coercion, *Thompson v. Adelberg & Berman,* 181 Ky. 487, 205 S. W. 558 (1918); or to impute that a non-trader is unworthy of credit or that an individual is a delinquent debtor, *Turner v. Brien,* 184 Iowa 320, 167 N. W. 584 (1918); *Vail v. Pennsylvania R.R.,* 103 N. J. L. 213, 136 A. 425 (1927).

Similarly, to impute that an individual is unable to meet his obligations, or that one is the victim of abject poverty has been found libelous per se. *Gross v. Needham Co-Operative Bank,* 312 Mass. 309, 44 N. E. 2d 690 (1942). *Katapodis v. Brooklyn Spectator Inc., supra.* See Note 3 A. L. R. 1590 (1918).

The refusal of a majority of the courts to hold that charges of indebtedness or delinquency in paying a debt are libelous per se when published concerning a non-trader seems to proceed upon the theory that unless such imputations reflect upon a trader or merchant who needs credit in his business, or unless the charges can be construed to impute dishonesty or insolvency so as to impeach the reputation of a non-trader, there can be no legal presumption of damages. The majority theory is not espoused by the Restatement, Torts Sec. 559, Comment b (1938):

> "Communications are often defamatory because they tend to expose another to hatred, ridicule, and contempt. A defamatory communication may tend to disparage another by reflecting unfavorably upon his personal morality or integrity, or it may consist of imputations which, while not affecting another's personal reputation, tend to discredit his financial standing in the community, and this is so whether or not the other is engaged in business or industry."

In view of the true nature of libel per se as propounded in the instant case, the distinction made by the majority of states between the credit reputation of traders and merchants as opposed to the individual's financial reputation represents an erroneous graft upon the law of libel per se. Moreover, the theory upon which this distinction reposes seems to ring artificial in the light of an individual's credit needs and modern credit practices.

Maynard C. Schaus, Jr.

INSURANCE—FIDELITY BONDS HELD CONTINUING CONTRACT—RECOVERY DENIED BEYOND FACE VALUE

Plaintiff was insured against losses through embezzlement by employees under a Blanket Position Bond issued by defendant insurer; the amount of the defendant's maximum liability as to acts of the insured's bookkeeper being stated as $5,000. Plaintiff paid annual premiums from 1942 until 1948 when it paid an amount equal to two and one-half times the annual premium for which the term of the bond was extended three years. A clause in the bond stipulated: "The payment of annual (or agreed) premiums during the term shall not render the amount of this bond cumulative from year to year." In 1948 plaintiff discovered that its bookkeeper had embezzled more than $5,000 during each of the years 1945, 1947 and 1948 and $3,975.47 in 1946. Plaintiff contended it should receive $18,975.47