Cornell Law Review

Volume 47
Issue 1 *Fall 1961*

Article 2

Libel-by-Extrinsic-Fact

Harry G. Henn

Follow this and additional works at: http://scholarship.law.cornell.edu/clr

 Part of the Law Commons

Recommended Citation
Harry G. Henn, *Libel-by-Extrinsic-Fact* , 47 Cornell L. Rev. 14 (1961)
Available at: http://scholarship.law.cornell.edu/clr/vol47/iss1/2

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

"LIBEL-BY-EXTRINSIC-FACT"*

Harry G. Henn†

BIRTHS

Mr. and Mrs. John E. Smith, of 102 Hunt Lane, yesterday became the parents of twin sons. Mrs. Smith is the former . . . .

ENGAGEMENTS

Mr. and Mrs. James R. Black, of 83 Central Place, have announced the engagement of their daughter, Eloise Joanne, to Mr. Philip F. Jones, son of . . . .

ADVERTISEMENT

These progressive dealers sell Five-Star (*****) Bacon in the new plastic carton:
Jeremy Straus Market
High-Grade Products, Inc.

OBITUARIES

The Rev. Robert J. Brown, 48, pastor of the First Church, was found dead late last evening at 25 Bomery Street . . . .

LETTERS TO THE EDITOR

Dear Editor:

Our county would be much better off if Richard B. Davis, County Budget Director, retired. He is near retirement age, parsimonious with public funds, unprogressive, and has allowed only token salary increments to county employees . . . .

Very truly yours,
William C. Johnson

On their face, all of the foregoing items appear rather commonplace, innocent, and nondefamatory. However, by reference to certain facts extrinsic to the published matter, each could be capable of a defamatory meaning highly injurious to reputation.

If, in the case of the birth notice, the Smiths (assuming that they had not become parents) had been married only a short time, that extrinsic fact would render the published item defamatory because of its suggestion of their premarital intercourse.[1]

With respect to the engagement notice, even if the announcement were made by the Blacks, and if Jones had in fact proposed to Eloise Joanne and been accepted, and if Jones were in fact already married, the published item along with such extrinsic fact could defame the existing Mrs. Jones by charging that she had cohabited with Mr. Jones other than as his lawful wife.[2]

* © Copyright 1961 by Harry G. Henn. The material in this article will form part of a chapter in a forthcoming text on the law of libel and slander. The text is being prepared under a grant from Frank E. Gannett Newspaper Foundation, Inc. which of course, is not responsible for the views expressed in this article. The author gratefully acknowledges the assistance of Irving P. Fox, of the New York Bar, who prepared the research analyses of the New York Court of Appeals cases, and also the assistance of Thomas G. Rickert, of the New York Bar, during their periods at the Cornell Law School.

† See contributors' section, masthead p. 69 for biographical data.

1 Cf. Morrison v. Ritchie & Co., 4 Sess. Cas. 5th Ser. 645, 39 Scot. L. Rep. 432 (1902); see also Woods v. Edinburgh Evening News, Ltd., 47 Scot. L. Rep. 786 (1910). See notes 147-150 infra.

2 Cf. Cassidy v. Daily Mirror Newspapers, Ltd. [1929] 2 K.B. 331, 69 A.L.R. 720, infra notes 144 and 150. Sydney v. Macfadden Newspaper Publishing Corp., 242 N.Y. 208, 151

The advertisement, innocent on its face, would defame Jeremy Straus in his business if, by way of extrinsic facts, he were a kosher meat dealer whose dealing in nonkosher meat products such as bacon would violate the tenets of the Orthodox Jewish faith.[3]

The obituary notice appears highly innocent since defamation of the dead gives rise to no civil liability,[4] and even to write falsely that a person is dead has been held not to be defamatory.[5] However, if the Rev. Robert J. Brown had not been found dead at 25 Bomery Street, and if that address—by way of extrinsic fact—were the address of a house of ill-repute, a defamatory charge that the clergyman visited such house for pleasure could be made out.[6]

On its face, the letter to the editor does not appear to libel William C. Johnson. However, if (assuming the criticisms of the budget director were not justified and Johnson did not write the letter) Johnson were a confidential assistant to the budget director—a fact extrinsic to the published item—the false attribution of authorship to him of such a letter unjustly criticizing his superior might defame him by impugning his fitness as a confidential assistant to the budget director.[7]

Published written matter, innocent on its face, when coupled with extrinsic facts which render it defamatory, may in some jurisdictions constitute actionable libel. In other jurisdictions, courts may impose an additional requirement—sometimes called the "libel-by-extrinsic-fact rule" —that in such cases special damages must be alleged and proved. Frequently applied or misapplied in several American jurisdictions, the "libel-by-extrinsic-fact rule" has been called "clearly contrary to the

---

N.E. 209 (1926), 44 A.L.R. 1419, and notes 103-108 infra; Smith v. Smith, 236 N.Y. 581, 142 N.E. 292 (1923), and notes 101, 102 infra; see also Karrigan v. Valentine, 184 Kan. 783, 339 P.2d 52 (1959); Henry v. New York Post, Inc., 280 N.Y. 842, 21 N.E.2d 887 (1939), and note 109 infra.

[3] Cf. Braun v. Armour & Co., 254 N.Y. 514, 173 N.E. 845 (1930), and notes 110-112 infra.

[4] Hughes v. New England Newspaper Publishing Co., 312 Mass. 178, 43 N.E.2d 657 (1942); Rose v. Daily Mirror, Inc., 284 N.Y. 335, 31 N.E.2d 182 (1940), 132 A.L.R. 888, 40 Colum. L. Rev. 1267 (1940), 26 Cornell L.Q. 732 (1941), 10 Fordham L. Rev. 319 (1941), 16 Ind. L.J. 595 (1941), 21 Ore. L. Rev. 309 (1942), 15 Temp. L.Q. 560 (1941), 19 Texas L. Rev. 515 (1941). But see Utah Code Ann. § 45-2-2 (1960) (libel defined to include "malicious defamation . . . tending to blacken the memory of one who is dead. . . ."). 3 Restatement, Torts § 560 (1938); Armstrong, "Nothing But Good of the Dead?," 18 A.B.A.J. 229 (1932); Annot., 146 A.L.R. 739 (1943). Criminal libel of the dead is, of course, possible in many jurisdictions.

[5] Lemmer v. The Tribune, 50 Mont. 559, 148 Pac. 338 (1915); Cohen v. New York Times Co., 153 App. Div. 242, 138 N.Y. Supp. 206 (2d Dep't 1912).

[6] Cf. Quinn v. Sun Printing & Publishing Co., 55 Misc. 572, 105 N.Y. Supp. 1092 (Sup. Ct. Onondaga County 1907), aff'd mem., 125 App. 900, 109 N.Y. Supp. 1143 (4th Dep't 1908).

[7] Cf. Shoolman v. Gannett Co., Cal. Ck. No. 59-582, N.Y. Sup. Ct. Monroe County, Feb. 4, 5, 8, 1960 (Macken, J.) (jury verdict of no cause of action); see also Van Heusen v. Argenteau, 194 N.Y. 309, 87 N.E. 437 (1909).

historical rule,"[8] a "peculiar departure from the common law,"[9] and a "new creature . . . that . . . is ugly and illegitimate and ought promptly to be strangled."[10] The rule is not recognized by the RESTATEMENT OF TORTS.[11]

Among the jurisdictions which do recognize the rule is New York, which, despite being one of the pioneers in promoting the rule and considering it in a series of leading cases, has yet to define its scope.

Any sound review of the cases propounding the rule requires an understanding of certain traditional principles of defamation law and the traditional meanings, within the context of such principles, of certain terms used in defamation law.

TRADITIONAL PRINCIPLES AND TERMINOLOGY OF DEFAMATION LAW

For over two centuries now,[12] defamation has been classified as either slander or libel, such classification depending upon the form of publication of the defamatory matter.[13] As a general rule, slander is actionable

---

[8] 1 Harper & James, Torts 373 n. 9 (1956).

[9] Prosser, Torts 588 (2d ed. 1955).

[10] Carpenter, "Libel Per Se in California and Some Other States," 17 So. Cal. L. Rev. 347 (1944).

[11] 3 Restatement, Torts § 569 (1938). At least the Restatement, which discusses "extrinsic circumstances" under meaning of the communication (§ 563, comment e), has been so characterized. Prosser, "Libel Per Quod," 46 Va. L. Rev. 839, 843 (1960). Dean Prosser, as Reporter for the Second Restatement of Torts, has the following re-restatement under consideration:

§ 569. Liability Without Proof of Special Harm.

(1) One who publishes defamatory matter is subject to liability without proof of special harm or loss of reputation if the defamation is

(a) Libel whose defamatory meaning is apparent from the publication itself without reference to extrinsic facts, or

(b) Libel or slander which imputes to another

(i) A criminal offense, as stated in § 571,

(ii) A loathsome disease, as stated in § 572,

(iii) Matter incompatible with his business, trade, profession or office, as stated in § 573, or

(iv) Unchastity on the part of a woman, as stated in § 574.

(2) One who publishes any other libel or slander is subject to liability only upon proof of special harm, as stated in § 575.

Prosser, supra note 9, 593.

In so doing, Dean Prosser suggests that the present Restatement rule is "out of date;" quaere, on the basis of many of the cases cited by Dean Prossner, whether it was not out of date when published in 1938, and whether his proposed rule is a more accurate restatement. See notes 128, 136, 140 infra.

[12] See Thorley v. Lord Kerry, 4 Taunt. 355, 128 Eng. Rep. 367 (C.P. 1812); Comment, "The Pre-Thorley-Kerry Case Law of the Libel-Slander Distinction," 23 U. Chi. L. Rev. 132 (1955). But see Grein v. La Poma, 54 Wash. 2d 844, 340 P.2d 766 (1959), 14 Ark. L. Rev. 353 (1960), 28 Fordham L. Rev. 852 (1959-60), 33 So. Cal. L. Rev. 104 (1959), 11 Syracuse L. Rev. 119 (1959), 35 Wash. L. Rev. 253 (1960).

[13] See Note, 43 Cornell L.Q. 320, 322-323 (1957), where the author summarized the inadequacies of the various dividing lines between libel and slander:

There is no universally accepted test for differentiating between libel and slander. Traditionally, the distinction has been based upon the form of the publication: written defamation constituted libel; oral defamation, slander. This written-oral dichotomy has been rationalized by resort to various assumptions: (1) a writing is more deliberately made than an oral statement; (2) a writing makes a greater impression on the eye than words do on the ear; (3) a writing is more permanent than speech; and (4) a

only upon allegation and proof (or admission) of special damage; libel is actionable without such allegation (or admission), since damage is conclusively presumed in the case of libel.[14] Since the allegation of special damage in a tort action was traditionally introduced by the phrase *"per quod"* (meaning "whereby"), followed by the recital of the damage, actions requiring such allegation came to be known as "actionable *per quod*"; actions which did not require such allegation were called "actionable *per se*."[15]

The special damage required is specific *pecuniary* loss proximately resulting from the published matter, such as loss of a particular customer, employment, contract, credit, marriage, election, etc., which must be both pleaded and established with particularity.[16] Unless the defamed person is able to sustain this onerous burden, when applicable, a cause of action cannot be made out. In effect, so far as the preponderance of defamatory matter is concerned, the existence of a remedy depends upon whether special damage is required or not.

Slander: Per Quod; Per Se

Slanderous matter subject to the general rule requiring allegation and proof of special damage is called nominatively "slander *per quod*" (or adjectivally "slanderous *per quod*") to indicate that such slander is only actionable *per quod* and not actionable *per se*.

The general rule of slander, however, is subject to certain rather well-established exceptions.[17] Most jurisdictions recognize three common-law exceptions (sometimes codified by statute):

---

writing has a wider area of dissemination than the spoken word. Each of the last three assumptions has tended to become an independent test for distinguishing libel from slander, especially for situations in which the written-oral dichotomy failed to achieve desired results. However, analysis reveals that the underlying basis of the written-oral dichotomy, as well as of these subsequent "tests" employed to extend libel beyond writings, is the degree of potentiality for harm to reputation inherent in the form of the publication. This suggests that the underlying basis itself—potentiality for harm—ought to be the test. . . .

See also Gatley, Libel and Slander 1-2 (4th ed. 1953); 1 Harper & James, Torts § 5.9 (1956); Prosser, Torts 585-588 (2d ed. 1955); 3 Restatement, Torts § 568 (1938); Prosser, supra note 11, at 842-43.

[14] See 3 Restatement, Torts §§ 575, 569 (1938).

[15] Black's Law Dictionary 1293-94 (4th ed. 1951); 3 Restatement, Torts § 569, comment b (1938).

[16] See McCormick, Damages §§ 113-15 (1935). Where a defamation action can be dismissed on motion for lack of allegation of special damage in a case requiring such allegation, the publisher can avoid expensive investigation and litigation. Of course, to the extent that the technicalities of the special damage requirement are relaxed, the more readily actionable is defamation. Nieman-Marcus Co. v. Lait, 107 F. Supp. 96 (S.D.N.Y. 1952); Trenton Mut. Life & Fire Ins. Co. v. Perrine, 23 N.J.L. 402 (1852); cf. Ratcliffe v. Evans [1892] 2 Q.B. 524 (injurious falsehood). See note, 47 Cornell L.Q. 92 (1961).

[17] 3 Restatement, Torts §§ 570-74 (1938). With respect to the "profession, trade, business, office, or calling" category of slander per se, there are two approaches: (1) "Reference test" requiring that the published matter expressly refer to the plaintiff's profession, trade, business, office, or calling [Shakun v. Sadinoff, 272 App. Div. 721, 74 N.Y.S.2d 556 (1st

1. Imputation of a serious crime;

2. Imputation of a loathsome disease;

3. Imputation tending to injure one in one's profession, trade, business, office, or calling;

and one statutory exception (sometimes recognized in the absence of statute):

4. Imputation of unchastity to a woman.

In the case of slanderous matter in any one of these four categories, damage is presumed as a matter of law, thereby dispensing with the requirement of allegation and proof of special damage. These exceptions are termed nominatively "slander *per se*" (or adjectivally, "slanderous *per se*") to indicate that such slander is actionable *per se*. In summary, then, all defamatory matter classifiable as slander is either slander *per quod*, which is actionable *per quod*, or slander *per se*, which is actionable *per se*.

Libel

As indicated above, the general rule of libel is that all libelous matter is actionable without allegation and proof of special damage ("actionable *per se*"). By this traditional approach, all defamatory matter classifiable as libel is "libel" without any "*per se*"—"*per quod*" breakdown. The phrase "libel *per se*" (or "libelous *per se*") is tautologous; the term "libel *per quod*" is self-contradictory.

Notwithstanding the traditional approach, the phrases, "libel *per se*," "libelous *per se*," "libel *per quod*," and "libel-by-extrinsic-fact" have been increasingly used in recent years. Appreciation of their significance and the confusion they have engendered depends to a large extent on an understanding of the curiously technical requirements imposed in connection with pleading of defamation actions at common law. In addition to allegations of the published matter *in haec verba*, the fact of its publication by the defendant, and consequent damages in order to make out the cause of action or to enhance the verdict or both, etc., the declaration (or complaint) might have had to include any one or more of the following:[18] (1) inducement, (2) colloquium, (3) innuendo.

Dep't 1947)]; (2) "Relation test" requiring only that the published matter bear a relation to the plaintiff's profession, trade, business, office [Sanderson v. Caldwell, 45 N.Y. 398 (1871); 3 Restatement, Torts § 573, comment e (1938)]. See Note, 51 Mich. L. Rev. 946 (1953). Cf. Bassell v. Ellmore, 48 N.Y. 561 (1872) (holding slanderous imputation of unchastity prior to 1871 New York statute not to constitute slander per se). By statute, California and a few other jurisdictions have made actionable per se slander imputing to a man or woman impotence or want of chastity. E.g., Cal. Civ. Code Ann. § 46(4) (Deering 1960); Annot., 55 A.L.R. 175 (1928).

[18] Shipman, Common Law Pleading 219-21 (3d ed. 1923). The distinction between the

Inducement

The inducement (from *induco*, meaning "lead to") was the name given to the explanatory allegation of fact introducing the main allegations (or gravamen) of the declaration in common-law pleading.[19] In a defamation case, the inducement supplied allegations of fact extrinsic to the published matter itself.[20] While serving functions relating to several elements of defamation,[21] the principal function of the inducement, so far as libel-by-extrinsic-fact was concerned, was to supply extrinsic facts which rendered matter nondefamatory on its face capable of having a defamatory meaning. The inducement also had to be "in traversable form," *i.e.*, any extrinsic fact had to be so alleged that it could be readily traversed or denied by the defendant.[22]

---

three terms was neatly put by De Grey, C.J., in Rex v. Horne, 2 Cowp. 672, 684, 98 Eng. Rep. 1300, 1306-07 (K.B. 1777), quoted in Kinney v. Nash, 3 N.Y. 177, 183 (1849):

> 'In an action upon the case against a man for saying of another "he has burnt my barn," the plaintiff cannot, by way of innuendo say, "meaning his barn full of corn;" because that is not an explanation of what is said before, but an addition to it. But if, in the introduction, it had been averred that the defendant had a barn full of corn, and that, in a discourse about that barn, the defendant had spoken the words charged, of the plaintiff, an innuendo of its being a barn full of corn would be good: for by coupling the innuendo in the words with the introductory averment, "his barn full of corn," would have made it complete. Here the extrinsic fact that the defendant had a barn full of corn is the introduction or inducement; the allegation that the words were uttered in a conversation relating to that barn, is the colloquium: and the explanation that the words thus spoken were applied to that barn full of corn, is the innuendo.'

See Bloss v. Tobey, 19 Mass. (2 Pick.) 320 (1824); 3 Restatement, Torts § 563, comment f (1938); Hall, "Pleading in Libel Actions in California," 12 So. Cal. L. Rev. 225, 231 n. 23 (1939).

[19] Shipman, supra note 18 at 195, 505.

[20] Such extrinsic facts could comprehend all of the surrounding circumstances necessary to define the meaning of the published matter, and could include (1) the circumstances under which the matter was published, (2) the circumstances connecting the published matter to the plaintiff, (3) the circumstances of the plaintiff's status which rendered published matter, which was nondefamatory on its face, capable of a defamatory meaning, or (4) any other circumstances which rendered published matter nondefamatory on its face capable of a defamatory meaning. Extrinsic facts of course, can render nondefamatory published matter which on its face appears defamatory. See Pallotta v. Uhtenwoldt, 167 Misc. 472, 3 N.Y.S.2d 408 (Sup. Ct. Kings County 1938); 3 Restatement, Torts § 563, comment e (1938). See also Bloss v. Tobey, 19 Mass. (2 Pick.) 320 (1824); Kinney v. Nash, 3 N.Y. 177 (1849); Van Vechten v. Hopkins, 5 Johns. 211 (N.Y. 1809).

[21] Extrinsic facts under which the published matter was published relate to the question of publication and the capability of the published matter of having a defamatory meaning. Extrinsic facts connecting the published matter to the plaintiff is solely concerned with the application of the published matter to the plaintiff. Steele v. Southwick, 9 Johns. 213 (N.Y. 1812). Extrinsic facts rendering published matter nondefamatory on its face capable of having a defamatory meaning relate only to the question of whether or not the published matter is capable of having a defamatory meaning. Sweetapple v. Jesse, 5 B. & Ad. 27, 110 Eng. Rep. 702 (K.B. 1833); Boydell v. Jones, 4 M. & W. 446, 150 Eng. Rep. 1504 (Ex. 1838); Foulger v. Newcomb, L.R. 2 Ex. 327, 36 L.J. Ex. 169 (1867).

[22] Rex v. Horne, 2 Cowp. 672, 98 Eng. Rep. 1300 (K.B. 1777). The technical requirement was that such allegations could not be mixed with the innuendo, which being no more than a logical inference was not subject to proof, since the defamatory character of the matter depended on the existence of the extrinsic facts and the defendant should have an opportunity to meet the plaintiff's attempt to prove them.

Colloquium

The colloquium[23] also served a multiple function. Primarily, it was the part of the declaration which alleged the ultimate facts necessary to identify the plaintiff as the person defamed.[24] Such identification (otherwise known as "application") might appear from the face of the published matter or might have to be established by extrinsic fact. In the latter case, the inducement supplied the necessary extrinsic fact. Application-by-extrinsic-fact should not be confused with libel-by-extrinsic-fact.

Modern pleading in some jurisdictions dispenses with the necessity of alleging extrinsic facts to show the application of the defamatory matter to the plaintiff and requires only the allegation of the conclusion of law that the publication of the defamatory matter was "of and concerning" the plaintiff.[25] Where the defendant denies application, the plaintiff has the burden of proving it by sufficient evidence.[26] The colloquium sometimes also served the additional function of connecting any extrinsic fact alleged in the inducement with the published matter.[27]

Innuendo

The innuendo was that part of the declaration which explained the meaning of the published matter, either taken by itself or together with the extrinsic facts alleged in the inducement. Such an explanation, frequently in parenthetical form, was called an innuendo because it was originally introduced by the word "*innuendo*" (translatable as "meaning").[28] The function of the innuendo, like that of the colloquium, was two-fold.

The more important function of the innuendo was to ascribe a defamatory meaning to published matter which, either taken by itself or together with the extrinsic facts alleged in the inducement, was reasonably capable of both defamatory and nondefamatory meanings. In the

---

23 The term "colloquium" is derived from the phrase "in quodam colloquio" (translatable as "in a certain conversation") from the averment in slander that the defendant spoke the slanderous words concerning the plaintiff or the subject matter in question "in a certain conversation." Webster's New International Dictionary 527 (2d ed. 1946).

24 Shipman, supra note 18 at 219-20.

25 Clark, Code Pleading 315-16 (2d ed. 1947). N.Y. R. Civ. Prac. 96 is a typical provision:

> In an action for libel or slander, it is not necessary to state in the complaint any extrinsic fact for the purpose of showing the application to the plaintiff of the defamatory matter, but the plaintiff may state in general terms that such matter was published or spoken concerning him.

See Van Heusen v. Argenteau, 194 N.Y. 309, 87 N.E. 437 (1909); Fry v. Bennett, 7 N.Y. Super. Ct. 54 (1851). See note 37 infra.

26 See Nunnally v. Tribune Ass'n, 111 App. Div. 485, 97 N.Y. Supp. 908 (1st Dep't 1906), aff'd mem., 186 N.Y. 533, 78 N.E. 1108 (1906).

27 Shipman, 220; Black's Law Dictionary 330 (4th ed. 1951).

28 Black's Law Dictionary 927 (4th ed. 1951).

absence of the required innuendo, the matter was construed in its non-defamatory sense and the declaration deemed defective as not stating a cause of action for defamation.[29] While the technical niceties of this common-law rule have been relaxed, the substance of the rule has been retained in modern pleading.[30]

The other function of the innuendo, which had nothing to do with libel-by-extrinsic-fact, was to point out the application of the defamatory matter to the plaintiff by inserting the parenthetical phrase "(meaning the plaintiff)" throughout the text of the published matter quoted in the declaration wherever there was doubt that such text referred to him.[31] In this sense, the innuendo complemented the colloquium so far as application was concerned.

As an allegation of inference rather than fact, the innuendo did not have to be "in traversable form."[32]

Since the primary function of the innuendo was strictly limited to explaining or defining equivocal published matter, it could not properly extend or enlarge the meaning of such matter either by interpreting it unreasonably[33] or by adding allegations of extrinsic fact, which could only be effectively pleaded in the inducement.[34]

Whether the published matter, either taken by itself or as supplemented by extrinsic fact, was reasonably capable of the construction put upon it by the innuendo alleged was a question of law for the court. If such matter was not reasonably capable of supporting the innuendo but nevertheless was so equivocal as to require an innuendo, the complaint was dismissable. If, on the other hand, such matter was capable of the meaning placed upon it by the innuendo, the question of whether that meaning was so understood was one of fact for the jury to decide.[35]

In view of the complementary and somewhat overlapping functions of the colloquium, the inducement, and the innuendo in common-law

[29] Hemmens v. Nelson, 138 N.Y. 517, 34 N.E. 342 (1893). See also authorities cited in 13 McKinney, Encyclopaedia of Pleading and Practice 57 (1898). See notes 44, 127, 134, 135, 138, 139 infra.

[30] See, e.g., Lasky v. Kempton, 285 App. Div. 1121, 140 N.Y.S.2d 526 (1st Dep't 1955), where a complaint was dismissed for lack of a properly pleaded innuendo. The modern English practice is similar and is described in Gatley, Libel and Slander 465-69 (4th ed. 1953).

[31] 1 Chitty, Pleading 422-24 (16th Amer. ed. 1876); Newell, Slander and Libel 588 (4th ed. 1924); Odgers, Libel and Slander 98-115 (6th ed. 1929).

[32] Properly, it could not be, since it posed a question of logical inference rather than one of fact. See 13 McKinney, supra note 29, at 54 n. 3 (1898).

[33] Broome v. Godsen, 1 C.B. 728, 135 Eng. Rep. 728 (C.P. 1845); Odgers, supra note 31, at 99 (6th ed. 1929). See notes 75-77 infra. As sometimes stated, it was not the nature of an innuendo to beget an action.

[34] Barham v. Nethersall, Yelv. 22, 80 Eng. Rep. 16 (K.B. 1602); Newell, supra note 31, at 598 (4th ed. 1924). See notes 69-72 infra.

[35] 3 Restatement, Torts § 614 (1938); see also 1 Harper & James, Torts § 5.29 (1956); Comment, "Functions of Judge and Jury in Defamation Cases in New York," 43 Cornell L.Q. 80, 82-83 (1957). See notes 73, 74 infra.

pleading, confused usage of the terms has arisen.[36] These varying usages have undoubtedly contributed to the more substantial confusion prevailing with respect to the terms "libel-by-extrinsic-fact," "libel *per se*," and "libelous *per se*."

Libel-by-Extrinsic-Fact

The term "libel-by-extrinsic-fact," unlike "libel *per se*," is rather easily defined. Properly used, it has reference to matter so published as to be classifiable as libel and rendered defamatory only by reference to extrinsic fact; the term has no relevance to whether extrinsic fact is necessary to establish application or whether an innuendo is required.[37] If such matter were so published as to be classifiable as slander, it would be called "slander-by-extrinsic-fact."[38]

Libel Per Se; Libelous Per Se

"Libel *per se*" literally means "libel on its face" or "libel in itself," terms which themselves may have variable meanings. 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*."[39] This adoption of slander law terminology for libel was done with no apparent

[36] See Thompson v. Upton, 218 Md. 433, 146 A.2d 880 (1958); Cal. Civ. Code Ann. § 45a (Deering 1960), and note 143 infra; 1 Harper & James, Torts 373 (1956); Carpenter, "Libel Per Se in California and Some Other States," 17 So. Cal. L. Rev. 347, 353 (1944); Isham, "Libel Per Se and Libel Per Quod in Ohio," 15 Ohio St. L.J. 303, 304 (1954).

[37] Courts occasionally confuse libel-by-extrinsic-fact and application-by-extrinsic-fact. The sounder view would appear to be that application-by-extrinsic-fact, if made out, should be governed by the same rules applicable to application by express reference to the plaintiff. Brayton v. Crowell-Collier Publishing Co., 205 F.2d 644 (2d Cir. 1953), 22 U. Cinc. L. Rev. 511 (1953); Klein v. Sunbeam Corp., 47 Del. 526, 94 A.2d 385 (1952); Marr v. Putnam, 196 Ore. 1, 246 P.2d 509 (1952), 41 Calif. L. Rev. 144 (1953), 28 N.Y.U.L. Rev. 220 (1953); Harwood Pharmacal Co. v. National Broadcasting Co., 9 N.Y.2d 460, 174 N.E. 2d 602, 214 N.Y.S.2d 725 (1961); Katapodis v. Brooklyn Spectator, Inc., 287 N.Y. 17, 38 N.E.2d 112 (1941); Le Dans, Ltd. v. Daley, 10 App. Div. 2d 502, 200 N.Y.S.2d 618 (1st Dep't 1960); Drug Research Corp. v. Curtis Publishing Co., 7 App. Div. 2d 285, 182 N.Y.S.2d 412 (1st Dep't 1959) (3-2), rev'd on other grounds, 7 N.Y.2d 435, 166 N.E.2d 319, 199 N.Y.S.2d 33 (1960) (4-3) (defamatory matter held not written of and concerning plaintiff). Cf. Stillman v. Paramount Pictures Corp., 2 App. Div. 2d 18, 153 N.Y.S.2d 190 (1st Dep't 1956) (4-1), aff'd without opinion, 5 N.Y.2d 994, 157 N.E.2d 728, 184 N.Y.S.2d 856 (1959); Anderson v. Music Trades Corp., — Misc. 2d — 209 N.Y.S.2d 137 (Sup. Ct. Westchester County 1960); Gillman v. Tenth District Dental Society of New York, 25 Misc. 2d 457, 201 N.Y.S.2d 644 (Sup. Ct. N.Y. County 1960). But see Lininger v. Knight, 123 Colo. 213, 226 P.2d 809 (1951), 23 Rocky Mt. L. Rev. 487 (1951); Rowan v. Gazette Printing Co., 74 Mont. 326, 239 Pac. 1035 (1925). See notes 25 supra and 143 infra.

[38] Defamation-by-extrinsic-fact is sometimes called "defamation covert;" defamation on its face has been called "defamation ex facie." Such terminology helps avoid the semantic confusion resulting from per quod-per se usage. The term, "prima facie defamatory," can cause as much confusion as the latter usage. See note 44 infra.

[39] Koerner v. Lawler, 180 Kan. 318, 304 P.2d 926 (1956); Rowan v. Gazette Printing Co., 74 Mont. 326, 239 Pac. 1035 (1925); Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938), 27 Calif. L. Rev. 84 (1938), 26 Geo. L.J. 1054 (1938), 37 Mich. L. Rev. 156 (1938), 15 N.Y.U.L.Q. Rev. 594 (1938); Becker v. Toulmin, 165 Ohio St. 549, 138 N.E.2d 391 (1956); Oliveros v. Henderson, 116 S.C. 77, 106 S.E. 855 (1920).

realization that the phrases "*per se*" and "*per quod*" in slander law related to the special damage requirement and distinguished slander actionable *per se* from slander actionable *per quod*,[40] and had no necessary relevance to the distinction between matter defamatory "on its face" or "in itself," and matter not defamatory "on its face" or "in itself." The inevitable consequence of such semantic confusion was to require special damage for libel other than libel *per se*.[41]

Thus, the meaning of "libel *per se*" may be of critical importance in determining whether or not the special damage requirement applies. Some cases, by emphasizing the "libel on its face" meaning, use "libel *per se*" in contrast to libel-by-extrinsic-fact.[42] Other cases are cited as assimilating libel-by-extrinsic-fact to slander, and concluding that whatever published written matter, supplemented by extrinsic fact, would, if published orally, constitute slander *per se*, constitutes libel *per se*.[43]

Other usages of "libel *per se*" (and "libelous *per se*") have developed. Some cases take the position that in cases of libel, whether by extrinsic fact or otherwise, there is no "libel *per se*" if an innuendo is required.[44]

---

[40] Prosser, "Libel Per Quod," 46 Va. L. Rev. 839, 848 n. 71 (1960). Dean Prosser suggests that most American courts were in fact assimilating libel-by-extrinsic-fact to slander because "the libel, as a libel, is incomplete," and "that, as is so often the case, the courts have known exactly what they were doing, and that it is the critics who are confused." Id. at 849. However, most of the cases he cites do not appear to do what they are cited as doing. See notes 128, 140 infra. See also Prosser, Torts 588 (2d ed. 1955); Note, "Libel Per Se and Special Damages," 13 Vand. L. Rev. 730 (1960); Comment, "New York, Libel Per Quod, and Special Damages: An Unresolved Dilemma," 27 Ford. L. Rev. 405 (1958); Note, "The Doctrine of Libel Per Se in Ohio," 9 W. Res. L. Rev. 43 (1957). For other possible explanations of what has been bothering the courts in "libel per quod" cases, see notes 152 and 153 infra.

[41] Koerner v. Lawler, 180 Kan. 318, 304 P.2d 926 (1956); Burr v. Winnett Times Publishing Co., 80 Mont. 70, 258 Pac. 242 (1927); Rowan v. Gazette Printing Co., 74 Mont. 326, 239 Pac. 1035 (1925); Dalton v. Woodward, 134 Neb. 915, 280 N.W. 215 (1938); Becker v. Toulmin, 165 Ohio St. 549, 138 N.E.2d 391 (1956); Denney v. Northwestern Credit Ass'n, 55 Wash. 331, 104 Pac. 769 (1909); Nichols v. Daily Reporter Co., 30 Utah 74, 83 Pac. 573 (1905).

[42] MacLeod v. Tribune Publishing Co., 52 Cal. 2d 536, 343 P.2d 36 (1959), 33 So. Cal. L. Rev. 88, 12 Stan. L. Rev. 685 (1960); 7 U.C.L.A.L. Rev. 560 (1960); Karrigan v. Valentine, 184 Kan. 783, 339 P.2d 52 (1959); Manley v. Harer, 73 Mont. 253, 235 Pac. 757 (1925); Prosser, "Libel Per Quod," 46 Va. L. Rev. 839 (1960); Comment, "New York, Libel Per Quod, and Special Damages: An Unresolved Dilemma," 27 Fordham L. Rev. 405 (1958); Note, "Libel Per Se in Oklahoma," 10 Okla. L. Rev. 474 (1957). Libel-by-extrinsic-fact would appear a preferable term. Seelman, The Law of Libel and Slander in the State of New York § 34 (1933).

[43] Whether or not the plaintiff's profession, trade, business, office, or calling, if not expressly referred to in the published matter, is, under slander law, an extrinsic fact or not depends upon whether the "reference test" or "relation test" is followed. See note 17 supra and notes 128, 140 infra.

[44] LaGrange Press v. Citizen Publishing Co., 252 Ill. App. 482 (1929); Miller v. First Nat'l Bank, 220 Iowa 1266, 264 N.W. 272 (1935); Shaw Cleaners & Dyers, Inc. v. Des Moines Dress Club, 215 Iowa 1130, 245 N.W. 231 (1932), 86 A.L.R. 839; Thompson v. Upton, 218 Md. 433, 146 A.2d 880 (1958) (unnecessary innuendo ignored as surplusage); Gustin v. Evening Press Co., 172 Mich. 311, 137 N.W. 674 (1912); Rail v. National Newspaper Ass'n, 198 Mo. App. 463, 478, 192 S.W. 129, 135 (1917); Woolston v. Montana Free Press, 90 Mont. 299, 2 P.2d 1020 (1931); Becker v. Toulmin, 165 Ohio St. 549, 138 N.E.2d 391 (1956); Edwards v. Crane, 292 P.2d 1034 (Okla. 1956), 10 Okla. L. Rev. 233 (1957); Tulsa Tribune Co. v. Kight, 174 Okla. 359, 50 P.2d 350 (1935), 14 Texas L. Rev. 410

The rationale in such cases seems to be that if written published matter is reasonably capable of only a defamatory meaning, it is libelous as a matter of law ("*per se*"); if capable of both defamatory and nondefamatory meanings, thereby requiring an innuendo and presenting an additional jury question, it is not defamatory as a matter of law and not libel "*per se*." Other cases call "libel *per se*" any published written matter, whether or not supported by extrinsic fact, which is capable of a defamatory meaning.[45]

Still other cases seem to use the terms "libel" and "libel *per se*" interchangeably, ignoring the redundancy of the latter phrase, requiring special damage only for torts related to libel,[46] and occasionally compounding the confusion by referring to the latter as "libel *per quod*."[47] Finally,

---

(1936); See Cal. Civ. Code Ann. § 45a (Deering 1960); Spiegel, "Defamation by Implication—In the Confidential Manner," 29 So. Cal. L. Rev. 306, 309-13 (1956); Note, "Determination of Libel Per Se Not Precluded By a Possible Innocent Meaning," 7 U.C.L.A.L. Rev. 560 (1960). See note 41 supra. "Libelous as a matter of law" is preferable to "libel per se" in characterizing such libel. See Brown v. DuFrey, 1 N.Y.2d 190, 134 N.E.2d 469, 151 N.Y.S.2d 649 (1956), 21 Albany L. Rev. 120 (1957), 23 Brooklyn L. Rev. 156 (1956). See Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938); Wimmer v. Oklahoma Publishing Co., 151 Okla. 123, 1 P.2d 671 (1931) (libelous per se where no innuendo, colloquium or inducement required to make out libel). See note 45 infra. The innuendo test has been characterized as a throw-back to the doctrine of mitiori sensu. Note, "Libel Per Se and Special Damages," 13 Vand. L. Rev. 730, 735, 743 (1960). The uses by the Oklahoma Supreme Court of the term "libelous per se" are criticized in Note, "Libel Per Se in Oklahoma," 10 Okla. L. Rev. 474, 475 (1957).

[45] Balabanoff v. Hearst Consol. Publications, Inc., 294 N.Y. 351, 62 N.E.2d 599 (1945); Greyhound Sec. Inc. v. Greyhound Corp., 11 App. Div. 2d 390, 207 N.Y.S.2d 383 (1st Dep't 1960); Westropp v. E. W. Scripps Co., 148 Ohio St. 365, 74 N.E.2d 340 (1947) (4-3); Purvis v. Bremer's, Inc., 54 Wash. 2d 743, 344 P.2d 705 (1959). See note 46 infra. For criticisms of Ohio decisions, see Note, "The Doctrine of Libel Per Se in Ohio," 9 W. Res. L. Rev. 43 (1957). A few cases have suggested a presumption-of-damage test. Whitaker v. Sherbrook Distributing Co., 189 S.C. 243, 200 S.E. 848 (1939); Nichols v. Daily Reporter Co., 30 Utah 74, 83 Pac. 573 (1905). Such a test appears to beg the question. See note 14 supra.

[46] Hanaw v. Jackson Patriot Co., 98 Mich. 506, 57 N.W. 734 (1894); Dalton v. Woodward, 134 Neb. 915, 280 N.W. 215 (1938); Balabanoff v. Hearst Consol. Publications, Inc., 294 N.Y. 351, 62 N.E.2d 599 (1945); Cleveland Leader Printing Co. v. Nethersole, 84 Ohio St. 118, 95 N.E. 735 (1911). Compare Hardwood Pharmacal Co. v. National Broadcasting Co., 9 N.Y.2d 460, 174 N.E.2d 602, 214 N.Y.S.2d 725 (1961) with Drug Research Corp. v. Curtis Publishing Co., 7 N.Y.2d 435, 166 N.E.2d 319, 199 N.Y.S.2d 33 (1960) (4-3). See Kee v. Armstrong, Byrd & Co., 75 Okla. 84, 182 Pac. 494 (1919), 5 A.L.R. 1349. See Note, "Libel Per Se and Special Damages," 13 Vand. L. Rev. 730, 734 n. 21 (1960); Note, "Libel Per Se in Oklahoma," 10 Okla. L. Rev. 474 (1957); Note, 65 U. Pa. L. Rev. 92 (1916).

[47] Bigelow v. Brumley, 138 Ohio St. 574, 594, 37 N.E.2d 584, 594 (1941), 40 Mich. L. Rev. 919 (1942), 90 U. Pa. L. Rev. 861 (1942); Hall, "Pleading in Libel Actions in California," 12 So. Cal. L. Rev. 225, 229-30 n.16 (1939). This tort (or different aspects of it) is variously called injurious falsehood, disparagement, slander of title, slander of goods, disparagement of title, disparagement of goods, trade libel, libel on the thing, unfair competition, interference with prospective advantage, etc. See Ratcliffe v. Evans [1892] 2 Q.B. 524; Al Raschid v. News Syndicate Co., 265 N.Y. 1, 191 N.E. 713 (1934), 14 B.U.L. Rev. 856 (1934), 4 Brooklyn L. Rev. 95 (1934), 12 N.Y.U.L.Q. Rev. 328 (1934). 1 Harper & James, Torts §§ 6.1-6.4 (1956); Prosser, Torts § 108 (2d ed. 1955); Salmond, Torts 447 (3d ed. 1912); 3 Restatement, Torts ch. 28 (1938); Prosser, "Injurious Falsehood: The Basis of Liability," 59 Colum. L. Rev. 425 (1959). See "The Doctrine of Libel Per Se in Ohio," 9 W. Res. L. Rev. 43, 50 (1957); Note, 28 Cornell L.Q. 226 (1943).

there are opinions and comments which use "libel *per se*" and "libelous *per se*" in varying senses.[48]

NEW YORK "RULE"

The New York libel-by-extrinsic-fact "rule" is generally attributed to the case of *O'Connell v. Press Publishing Co.*,[49] decided by the New York Court of Appeals in 1915. The opinion contained the following language:[50]

> The appellant then invokes the established rules of law that: (a) a publisher of a libel not defamatory upon its face, and defamatory by virtue of extrinsic facts is liable only for the pecuniary damage which legally resulted from the publication; and (b) the facts showing such damage must be fully and specifically set forth in the complaint. General allegations of damage are not sufficient. [Citing *Bassell v. Elmore*;[51] *Stone v. Cooper*;[52] *Crashley v. Press Pub. Co.*;[53] *McNamara v. Goldan*[54].] . . .

An examination of the earlier New York decisions, including those cited in the *O'Connell* opinion, reveals that no case had held that where resort to extrinsic facts was necessary in order to show that the matter was defamatory, special damages had to be pleaded and proved.

Pre-1915 Cases

The pre-1915 cases, which on first blush would seem to lend some support to the language in the *O'Connell* case, can be divided into four principal groups:

1. Those in which the plaintiff failed to plead any (or sufficient) extrinsic facts (required inducement lacking);
2. Those in which extrinsic facts were unproperly pleaded (inducement improperly pleaded);
3. Those in which the plaintiff failed to plead an innuendo assigning a defamatory meaning to equivocal published matter (required innuendo lacking);
4. Those in which the published matter alone or together with the extrinsic facts pleaded did not support the innuendo pleaded (innuendo not supported by published matter or inducement).

---

[48] Chase v. New Mexico Publishing Co., 53 N.M. 145, 203 P.2d 594 (1949); Balabanoff v. Hearst Consol. Publications, Inc., 294 N.Y. 351, 62 N.E.2d 599 (1945); Edwards v. Crane, 292 P.2d 1034 (Okla. 1956); Prosser, "Libel Per Quod," 46 Va. L. Rev. 839, 843-48 (1960), discussed in notes 124, 136 infra; 36 C.J. § 17 (1924); 53 C.J.S. § 8 (1948). For an excellent analysis of the prevailing confusion, see Note, "Libel Per Se and Special Damages," 13 Vand. L. Rev. 730, 733-35 (1960).

[49] 214 N.Y. 352, 108 N.E. 556 (1915).

[50] Id. at 358, 108 N.E. at 557.

[51] 48 N.Y. 561 (1872).

[52] 2 Denio 293, 299 (N.Y. 1845).

[53] 179 N.Y. 27, 71 N.E. 258 (1904).

[54] 194 N.Y. 315, 87 N.E. 440 (1909).

Required Extrinsic Facts Not Pleaded

In *Crashley v. Press Publishing Co.*,[55] cited by the Court of Appeals in the *O'Connell* case, the published matter stated that a revolutionary movement in Brazil had its headquarters in the plaintiff's boatshop there. After dismissal of the complaint in the lower courts,[56] the defendants argued in the Court of Appeals: (1) the published matter was not libelous *per se*; (2) the plaintiff had not pleaded that rebellion was a crime under the laws of Brazil; (3) to sustain an action for libel with special damages, the latter must be pecuniary; (4) such damages must be the natural and proximate result of the publication and were not in this case; and (5) the plaintiff, therefore, failed to make out a case of libel with special damages.[57] The Court of Appeals (6-1) affirmed the dismissal of the complaint, saying:[58]

> The article was not libelous *per se*. To complain of an article as being libelous, because charging the complainant with taking part in a revolt, or rebellion, within the government of Brazil, is quite insufficient, in the absence of an allegation of the existence of some statute, making such an act a treasonable offense and prescribing pains, or penalties, for the commission of the crime. The court cannot assume that the laws of Brazil are similar to the common law upon the subject of treason to the State. . . . If the article had imputed to the plaintiff the commission of that which is an heinous offense against organized society, and commonly known to be recognized as such by civilized nations; if it charged him with some conduct, which reflected upon his character, in such wise as to expose him to contempt, ridicule, or disgrace, it would be libelous *per se*.
>
> [H]istory teaches us that [in South America] . . . as elsewhere, there have been numerous instances of persons, whose leadership, or participation, in a revolt against the government, has exalted them in the public eye, because regarded as having devoted, or sacrificed, themselves in a heroic effort to right some great political wrong and to bring about a freer enjoyment of political rights, or a moral administration of government. . . .
>
> The complaint, showing no publication actionable *per se*, is defective for alleging no special pecuniary damages. [Citing *Stone v. Cooper*] . . . .

Thus, the *Crashley* case merely stands for the proposition that when the published matter is not itself libelous ("libelous *per se*"), any extrinsic fact necessary to give the published matter a defamatory meaning must be pleaded in the complaint. Otherwise, the complaint does not allege a libel ("publication actionable *per se*"), and the plaintiff's remedy, if any, would be an action on the case for false (but nondefamatory) words, *i.e.*, injurious falsehood, a required element of which is "special pecuniary damages."[59]

---

55 See note 53 supra.
56 74 App. Div. 118, 77 N.Y. Supp. 711 (1st Dep't 1902).
57 Supra note 53 at 31.
58 Id. at 32, 33, 34, 71 N.E. at 259.
59 See note 47 supra.

In *Van Heusen v. Argenteau*,[60] cited by defendant's counsel, but not by the Court of Appeals in the *O'Connell* case, the defendant wrote a letter that was published in a newspaper. The letter dealt with the disqualification of defendant's dog and stated that it was a matter for the "N.E.K.C." It went on to the effect that the culprit could be discovered by determining who had had the opportunity to dye the dog, who had had the motive, and who had discovered on the last day of the show that the dog had been dyed. Finally, it claimed that an answer to these questions would reveal who had committed the crime involved. The plaintiff sued, alleging that the letter was intended to brand her as the culprit. On appeal from the lower courts' holding that the complaint stated a cause of action,[61] the defendant argued that the complaint failed to state a cause of action without an allegation of special damage, unless the publication complained of was libelous *per se*, and that this publication was not libelous *per se*.[62] The Court of Appeals held that there was no cause of action, stating (per Cullen, Ch. J.):[63]

> In my judgment the article does not on its face libel any individual. . . . If at an exhibition of dogs where parties enter their respective animals and compete for prizes, a person in order to secure an award of the prize for himself should do something to the competing dogs which would exclude them from the chance of receiving the award it would be dishonorable, and to impute to a person the commission of such an act would be libelous. The difficulty here is that there is no allegation in the complaint that there was any exhibition or competition of the kind suggested, nor that either defendant's dog nor the plaintiff's were entered therein. The courts cannot take judicial notice of the meaning of the initials 'N.E.K.C.' nor if those initials stand for the name of some association, what are its objects and what business it conducts. There is in the letter a reference to a 'show' and from the fact that a dog seems to have been the cause of this controversy we may imagine that the show was a dog show, but are we to take notice of how dog shows are conducted, that competition between entries is had at such exhibitions and that prizes are awarded? These are all extrinsic matters that should have been alleged in the complaint. . . .

Again the holding was merely that where extrinsic facts are required to give a defamatory meaning to matter which is innocent on its face, such facts must be alleged in the complaint. Since the plaintiff made no attempt to allege extrinsic facts, the question of special damage never arose.

In *Stone v. Cooper*,[64] cited by the Court of Appeals in the *O'Connell* case, an action was brought for an article which stated in part:[65] " 'Mr.

[60] 194 N.Y. 309, 87 N.E. 437 (1909).
[61] 124 App. Div. 776, 109 N.Y. Supp. 238 (1st Dep't 1908).
[62] 194 N.Y. 309, 310 (1909).
[63] Id. at 313, 314, 87 N.E. at 439.
[64] 2 Denio 293 (N.Y. 1845).
[65] Id. at 294.

J. Fennimore Cooper need not be so fidgety in his anxiety to finger the cash to be paid by us towards his support.' " In rejecting (15-5) the claim that this was libelous *per se*, the Court for the Correction of Errors pointed out that although it knew that a libel award was the source of the cash referred to, it could not take judicial notice of such fact. Therefore, if the plaintiff supposed that the defendant intended to convey the impression that the plaintiff was in the habit of prosecuting libel suits for the sole purpose of obtaining money for his support, he should have alleged the nature of the controversy upon which the award was made together with such additional facts as would support this interpretation. The Court continued:

> Whether this part of the publication could have been made libellous by any averments of extrinsic facts and circumstances, it is not necessary now to determine. It is sufficient to say it is not libellous *per se*; and that there is nothing in the declaration which can authorize the court to say it was calculated to injure the character of the plaintiff, or to degrade him in the public estimation. . . .[66]
>
> Where from the nature of the charge, therefore, in connection with other facts stated in the plaintiff's declaration, no such injury or loss will necessarily or even probably result to him in consequence of the publication of such charge, he cannot recover damages as for a libel, without averring and proving that special damage has been in fact sustained by him. . . .[67]

Here, again, the holding was that the complaint alleged nothing "libelous *per se* " and that the extrinsic fact was not supplied by any inducement. Since recovery, "as for a libel," without allegation and proof of special damage, failed, relief would have to be based on some tort theory other than defamation and hence would require allegation and proof of special damage.[68]

Extrinsic Facts Pleaded Improperly

Extrinsic facts, as shown above, must be alleged in the inducement independently—"in traversable form"—and not as part of any innuendo. Under such rule, the courts must ignore extrinsic facts which are not properly pleaded, thereby treating the complaint as not alleging any extrinsic facts at all. The result is that the plaintiff cannot recover because he has not shown that the matter is defamatory.

Illustrative of this rule is *McNamara v. Goldan*,[69] decided on the same day as *Van Heusen v. Argenteau*,[70] and also cited by the Court of

---

[66] Id. at 298.
[67] Id. at 300.
[68] See note 59 supra.
[69] 194 N.Y. 315, 87 N.E. 440 (1909).
[70] See notes 62, 63 supra.

Appeals in the *O'Connell* case. The action for libel was based upon a letter written by the defendant in which plaintiff was referred to by name and which dealt with certain anonymous letters that had been sent through the mails (though not apparently connecting plaintiff to them). The plaintiff claimed that defendant's letter imputed to him the authorship of obscene letters. This claim was, however, stated only by way of an innuendo explaining the phrase "anonymous letters." In affirming the dismissal of the complaint,[71] the Court said (per Chase, J.):[72]

> The letter does not charge the person therein referred to with the commission of any crime defined by statute or known to the common law, nor of any act or conduct entitling the plaintiff to damages without proof of extrinsic facts. . . . It does not appear from the letter that the anonymous letters complained of were not in themselves entirely innocent. . . . It was, therefore, necessary for the plaintiff to include in his complaint allegations of extrinsic facts to show that the words used in the letter are actionable. As the letter is not defamatory and libelous *per se* it was also necessary for the plaintiff to allege and claim special damages arising from the publication of the letter. [Citing *Crashley v. Press Publishing Co.*]

Required Innuendo Not Pleaded

When published matter, either itself or by reference to extrinsic fact, is reasonably capable of both defamatory and nondefamatory meanings, the complaint, as previously discussed, must state by way of innuendo the defamatory meaning.

Thus in the *Crashley* case,[73] the plaintiff also argued that the words "an Englishman, of more or less indifferent repute" were libelous *per se*. The Court disagreed:[74]

> If the complaint had alleged the libelous meaning by innuendo, to wit, that the words meant that the plaintiff's reputation, or character, was bad, that would have been so. As a mere statement, however, without innuendo, the language signifies nothing, except that the person spoken of had no particular 'repute,' one way or the other, or that he had but an ordinary reputation, or that he was too obscure to have gained any repute. Many persons possessing excellent characteristics might find themselves in that category.
>
> The complaint, showing no publication actionable *per se*, is defective for alleging no special pecuniary damages. . . .

Innuendo Not Supported by Published Matter or Inducement

When an innuendo is required and the innuendo pleaded is not supported either by the published matter or by the extrinsic fact alleged in the inducement, the pleaded innuendo must be ignored. The result

---

[71] 122 App. Div. 922, 108 N.Y. Supp. 1139 (1st Dep't 1907).

[72] 194 N.Y. 315, 321, 87 N.E. 440, 442 (1909). See also Andrews v. Woodmansee, 15 Wend. 232 (N.Y. 1836): Vaughan v. Havens, 8 Johns. R. 109 (N.Y. 1811).

[73] 179 N.Y. 27, 71 N.E. 258 (1904).

[74] Id. at 34, 71 N.E. at 260.

is the same as if no innuendo were pleaded at all. Since no cause of action for defamation is stated if the required innuendo is missing, the complaint must then be tested by the related tort theory of injurious (but nondefamatory) falsehood which requires special damage.[75]

The case of *Potter v. Pictorial Review Co.*[76] is in point. The article complained of was alleged to have charged plaintiff, a civil engineer, with having, on the suggestion of politicians, drawn plans for a city water supply station with inadequate provision for purification, and with improperly concealing such defect. On appeal, the overruling of the defendant's demurrer was reversed:[77]

> It is nowhere alleged that plaintiff was ever an official of the city or even that he was generally referred to or known as such. Plaintiff, therefore, can have no benefit from the innuendoes which attempt to enlarge the plain meaning of the words of the article. . . . The article, thus interpreted, contains nothing libelous *per se*, and, as there is no special damage alleged, the demurrer was good.

Other Libel Cases

Only by quoting out of context statements from the above analyzed opinions, some admittedly not as aptly phrased as they might have been, can any verbal support be found for the broad language in the *O'Connell* case. Moreover, there are pre-1915 New York libel cases whose actual holdings are directly contrary to such broad language. Among such cases are those upholding a cause of action without special damage where the published matter, although nondefamatory on its face, was rendered defamatory by reference to properly pleaded extrinsic facts relating to the plaintiff's profession, trade, business, office, calling,[78] or other status,[79] or to circumstances other than the plaintiff's status.[80]

The leading case is *Gates v. New York Recorder Co.*,[81] which, while

---

[75] See note 59 supra.

[76] 156 App. Div. 874, 142 N.Y. Supp. 208 (1st Dep't 1913); see also Van Heusen v. Argenteau, 194 N.Y. 309, 312-13, 87 N.E. 437, 438-39 (1909); Parker v. Bennett, 68 App. Div. 148, 74 N.Y. Supp. 214 (1st Dep't 1902).

[77] 156 App. Div. 875, 142 N.Y. Supp. 208 (1st Dep't 1913).

[78] See Gideon v. Dwyer, 87 Hun 246, 33 N.Y. Supp. 754 (Gen. Term, 1st Dep't 1895) (slander); Crandall v. Jacob, 22 App. Div. 400, 48 N.Y. Supp. 279 (2d Dep't 1897) (slander). See also Sanderson v. Caldwell, 45 N.Y. 398 (1871) (where it is held that extrinsic facts as to plaintiff's profession may be shown to enhance damages in an action for libel otherwise actionable); Cruikshank v. Bennett, 30 Misc. 232, 62 N.Y. Supp. 118 (Sup. Ct. Kings County 1900).

[79] Morey v. Morning Journal Ass'n, 123 N.Y. 207, 25 N.E. 161 (1890) (married man accused of being prospective defendant in breach of promise suit).

[80] Gates v. New York Recorder Co., 155 N.Y. 228, 49 N.E. 769 (1898); Chapman v. Smith, 13 Johns. R. 77 (N.Y. 1816). Cf. Stone v. Cooper, 2 Denio 293 (N.Y. 1845): Bonner v. McPhail, 31 Barb. 106 (N.Y. Sup. Ct. Kings County 1860). See also Horton v. Binghamton Press Co., 122 App. Div. 332, 106 N.Y. Supp. 875 (3d Dep't 1907), appeal dismissed, 200 N.Y. 550, 93 N.E. 1112 (1910).

[81] 155 N.Y. 228, 49 N.E. 769 (1898).

pleaded and tried as a libel-by-extrinsic-fact case did involve facts which were probably capable of judicial notice. There the defendant newspaper had published of the plaintiff, three days after her marriage, that she was a " 'dashing blonde, twenty years old, and is said to have been a concert-hall singer and dancer at Coney Island.' "[82]

The plaintiff sued, alleging that Coney Island concert halls were resorts for disorderly persons and that the female performers were generally depraved, and at the trial gave evidence to substantiate her claim. On appeal, the defendant urged, *inter alia:* (1) The complaint should have been dismissed since the words were not libelous *per se* and no special damages had been alleged; and (2) the admission of evidence on the reputation of the Coney Island concert halls was error.[83] The Court of Appeals (4-2) affirmed:[84]

> To say that the words published of the plaintiff in the community where the character of the concert hall is well known were not calculated to hold her up to disgrace and disrepute and to charge her with unchaste conduct, is to reach a conclusion both illogical and unjust. Such a charge is libelous *per se*. . . .

Although the facts here involved were so well-known in the community as to be the subject of judicial notice, there are other decisions in accord where the knowledge of the facts was not so widespread.[85]

Slander-by-Extrinsic-Fact

There are pre-1915 New York slander cases where, despite the necessity of reference to extrinsic fact to bring the published matter within one of the four categories of slander *per se*, special damage was not required.[86] Thus in *Gideon v. Dwyer*,[87] the oral utterance sued on was:[88]

> 'You are no sportsman. You had to leave Nashville on account of a turf fraud you committed there. President Clark, of the Louisville Jockey Club, wanted to rule you off for your crooked practices there, and warned you off the turf there, and you had to leave town.'

---

[82] Id. at 230, 49 N.E. at 769.
[83] Id. at 229.
[84] Id. at 231, 49 N.E. at 770.
[85] See Witcher v. Jones, 17 N.Y. Supp. 491 (C.P. 1892), aff'd on opinion below, 137 N.Y. 599, 33 N.E. 743 (1893).
[86] See Gorham v. Ives, 2 Wend. 534 (N.Y. 1829); Mott v. Comstock, 7 Cow. 654 (N.Y. 1827); Chapman v. Smith, 13 Johns. 77 (N.Y. 1816); Crandall v. Jacob, 22 App. Div. 400, 48 N.Y. Supp. 279 (2d Dep't 1897); Gideon v. Dwyer, 87 Hun 246, 33 N.Y. Supp. 754 (Gen. Term, 1st Dep't 1895); Cf. Andrews v. Woodmansee, 15 Wend. 232 (N.Y. 1836); Hatfield v. Sisson, 28 Misc. 255, 59 N.Y. Supp. 73 (Sup. Ct. N.Y. County 1899); Nealon v. Frisbie, 11 Misc. 12, 31 N.Y. Supp. 856 (Super. Ct. N.Y. City 1895); Havemeyer v. Fuller, 60 How. Prac. 316, 10 Abb. N.C. 9 (N.Y. Super. Ct. 1881); Bonner v. McPhail, 31 Barb. 106 (N.Y. Sup. Ct. Kings County 1860). See note 17 supra (discussion of "reference test" and "relation test").
[87] 87 Hun 246, 33 N.Y. Supp. 754 (Gen. Term, 1st Dep't 1895).
[88] Id. at 248, 33 N.Y. Supp. at 755.

These words alone are clearly not within any of the categories of slander *per se*. However, the plaintiff alleged the extrinsic facts that he was the owner and breeder of thoroughbred horses for racing purposes and that his business was the selling and racing of such horses. He further alleged that since nearly all racing associations were centrally controlled, any owner involved in fraudulent practices would be precluded from entering his horses in races anywhere. In upholding (2-1) the complaint against a demurrer on the ground that the words were not actionable *per se* and no special damages were alleged, the Court said:[89]

> 'The defamatory words were not confined to the plaintiff's character as a sportsman. They also charged him with the commission of turf frauds. Now it is distinctly averred that the plaintiff is engaged in the business of raising and selling horses, and of entering and running horses in races lawfully conducted. . . . To say of such a man that he had committed turf frauds, and that he was warned off the turf for crooked practices thereon, is clearly to defame him in the business thus set out. They tended to prejudice him therein. . . .'

O'Connell Case

With the above as background, the *O'Connell* case[90] can be seen in clearer perspective.

The action was based on a news article printed in defendant's two newspapers. The article dealt with the trial of certain minor officials of the Sugar Trust for participation in the fraudulent weighing of sugar whereby the import duties were avoided. It also referred to the simultaneous presentation of evidence to a grand jury for the purpose of indicting men higher up. One article contained the following:[91]

> 'FRAUD INDICTMENT NEAR FOR OFFICER OF SUGAR TRUST. FEDERAL GRAND JURY HAS EVIDENCE, GAINED FROM MEN NOW ON TRIAL, IMPLICATING HIM IN WEIGHING TRICKERY. ONE WITNESS IS INVENTOR OF "CORSET STEEL" SPRING. WEIGHER TESTIFIES THAT SPITZER TOLD HIM TO "SEE BENDERNAGEL AND GET AN ENVELOPE.'
>
> * * *
>
> 'The December Grand Jury also examined a witness named O'Connell, who has not appeared in the criminal trial. It is said he testified to having invented the corset steel spring device and to having shown it to an official of the trust, who referred him to Oliver Spitzer, dock superintendent. . . .
>
> * * *
>
> 'Another witness was Harvey E. Miller of the Fairbanks Scale Company, who testified that in his opinion the scales used on the sugar piers had

[89] Id. at 250, 33 N.Y. Supp. at 756. See note 17 supra (discussion of "reference test" and "relation test").

[90] 214 N.Y. 352, 108 N.E. 556 (1915).

[91] Id. at 355, 355-57, 108 N.E. at 556.

> been changed since they were bought. In examining them, he says he found bolt holes showing that the scales originally had a longer beam than they had when the spring was used. . . .'

The plaintiff pleaded the offensive articles in their entirety, an inducement referring to the provisions of various federal criminal statutes, and an innuendo that both amounted to a charge of criminal conduct. The lower courts upheld the complaint on the ground that the articles fairly charged plaintiff with an offense against the statutes cited.[92]

In the Court of Appeals, the defendant urged that:[93] (1) The matters of inducement set forth in the complaint could not make out a cause of action for libel unless there were at the same time proper allegation of special damage, citing TOWNSHEND ON SLANDER AND LIBEL, *Van Heusen v. Argenteau, Crashley v. Press Publishing Co.*, and *McNamara v. Goldan;* and (2) Neither publication, in any meaning which could be perceived from the article itself, charged the plaintiff with committing a crime nor did either make any other statements that could be regarded as defamatory. As previously discussed, none of the cases cited supports the first proposition. Nor do the citations to Townshend.[94] The Court of Appeals (4-3) reversed:[95]

> The appellant asserts that either publication is not a libel *per se* or upon its face, and if a libel, is so only by reason of the facts extrinsic to it and alleged in the complaint, and the complaint does not allege that the publication caused the respondent special damage. The appellant then invokes the established rules of law that (a) a publisher of a libel not defamatory upon its face, and defamatory by virtue of extrinsic facts is liable only for the pecuniary damage which legally resulted from the publication, and (b) the facts showing such damage must be fully and specifically set forth in the complaint. General allegations of damage are not sufficient. [Citing *Bassell v. Elmore*; *Stone v. Cooper*; *Crashley v. Press Publishing Co.*; *McNamara v. Goldan.*] Indisputably, the present complaint contains only general allegations of damage. Therefore, we must determine whether or not the publication in and of itself was libelous.
>
> * * *
>
> The innuendoes of the complaint seek to give the language of the publication a broader application, but improperly and ineffectually, because it is not the office of the innuendo to graft a meaning upon or enlarge the

---

92 155 App. Div. 918, 140 N.Y. Supp. 1134 (2d Dep't 1913).

93 214 N.Y. 352, 353, 108 N.E. 556, 557 (1915).

94 Townshend, Slander and Libel §§ 308, 345 (4th ed. 1890). Section 308 of Townshend deals with the necessity of alleging extrinsic matter when the defamatory character of the words depends on it, using the terms "per se" and "actionable per se." Section 345 contains the following:

> Where the language is actionable per se, special damage need not be alleged; but if the language is not actionable per se, special damage must be alleged.

Since Townshend earlier defines the term "actionable per se" in its traditional sense, viz., words actionable per se are those on which an action can be brought without a showing of special damage (§§ 157 et seq.), Townshend's statement in § 345 is a mere truism.

95 214 N.Y. 352, 358, 360, 108 N.E. 556, 557, 558 (1915).

> matter set forth, but to explain the application of the words used. The allegations of extrinsic facts do not enter into the discussion for the reason that if the defamatory matter is actionable *per se*, no inducement or averment of extrinsic facts is necessary. The publication does not charge the plaintiff with a crime or expose him to contempt, ridicule or disgrace. The invention of a device which may be used for criminal purposes and the showing of it to a person in whose business it might be so used and the fact that he did use it, do not, within reasonable and fair contemplation or understanding, tend to incriminate or disgrace the inventor. The plaintiff was not charged by the publication with an illegal or immoral act or exposed to contempt, ridicule or disgrace.

It is rather difficult to determine the extrinsic facts to which the Court alludes. In the record on appeal the defendant refers to the following extrinsic facts:[96] (1) the employment of the plaintiff by the Sugar Trust; (2) the function of the corset steel spring device; and (3) the federal statutes. Neither the fact that plaintiff was an employee of the Sugar Trust nor the function of the spring renders the published matter defamatory. Federal statutes, being quite a different matter from foreign law such as a statute of Brazil, as in the *Crashley* case, certainly cannot be considered extrinsic facts. Special Term recognized this when it remarked that federal statutes could be judicially noticed and were, therefore, of no different status than a criminal statute of New York, which has never been treated as an extrinsic fact.[97] It would certainly seem that federal statutes are quite clearly as susceptible of judicial notice as the reputation of "Coney Island concert halls" was in the *Gates* case.

Thus in the *O'Connell* case, the actual holding was that the published matter, together with such extrinsic facts as were alleged, neither was reasonably capable of only a defamatory meaning nor supported the innuendoes that the plaintiff had violated a criminal statute or done something disgraceful. Otherwise the sentence in the opinion that the "innuendoes of the complaint seek to give the langnage . . . a broader application . . ."[98] has no significance. The same is true of the Court's statement that the invention of a device which can be used for criminal purposes and the showing of it to one who does so use it does not "within reasonable and fair contemplation or understanding, tend to incriminate or disgrace the inventor."[99]

Uttered as dictum and unsupported by previous holdings of the New York courts, the "rule" of the *O'Connell* case, whatever it might mean,

[96] Record, ff. 9, 11-12, 15-17, 19-23, 33-37, 44-45, Brief for Appellant, pp. 5-6, O'Connell v. Press Publishing Co., 214 N.Y. 352, 108 N.E. 556 (1915).

[97] 77 Misc. 3, 12, 137 N.Y. Supp. 332, 336 (Sup. Ct. Kings County 1912). See N.Y. Civ. Prac. Act § 344-a.

[98] 214 N.Y. 360, 108 N.E. 558 (1915).

[99] Ibid.

however, has persisted. Broadly stated, the "rule" requires special damage whenever published matter is not libelous on its face, but becomes defamatory by reference to extrinsic fact. So stated, the "rule" is inconsistent with the traditional principle that all defamation classifiable as libel is actionable without special damage, and since special damage was never required when extrinsic facts were necessary to bring published matter classifiable as slander within one of the four categories of slander *per se*, violative of the well-settled maxim that "Written words are libellous in all cases where, if spoken, they would be actionable. . . ."[100]

COURT OF APPEALS CASES SUBSEQUENT TO O'CONNELL CASE

Nevertheless, the "rule" of the *O'Connell* case still must be reckoned with, for the New York Court of Appeals has never expressly overruled it, although presented with the opportunity to do so on several occasions since 1915.

In *Smith v. Smith*,[101] the complaint, without alleging special damages, stated:[102]

> [T]hat on June 18, 1921, the defendant filed in the office of the city clerk of the city of New York a sworn application for a marriage license which contained the following matter alleged to have been libelous: 'Number of marriage, 1; is applicant a divorced person, No;' that this affidavit became a public record and the details thereof were published to the world in various newpapers; that defendant thereby intended to mean that the intended marriage was the first marriage; that he had never been married to the plaintiff and had never been divorced from her; that the plaintiff had never been his wife and that during the time she lived with him she had been living with him as his mistress with a meretricious relationship.

Although the published matter mentioned neither the plaintiff nor her former marital status, the Court held that the complaint stated a cause of action. In other words, special damage was not required where the extrinsic fact of plaintiff's prior marital status as wife of the defendant was necessary not only for application but to render the published matter capable of being construed only in a defamatory sense as an imputation of unchastity.

In *Sydney v. MacFadden Newspaper Publishing Corp.*,[103] the plain-

[100] Moore v. Francis, 121 N.Y. 199, 204, 23 N.E. 1127, 1128 (1890); Weston v. Weston, 83 App. Div. 520, 523, 82 N.Y. Supp. 351, 353 (4th Dep't 1903); Simpson v. Press Publishing Co., 33 Misc. 228, 229, 67 N.Y. Supp. 401, 402 (Sup. Ct. Kings County 1900). See also Kindley v. Privette, 241 N.C. 140, 84 S.E.2d 660 (1954); Bigelow v. Brumley, 138 Ohio St. 574, 37 N.E.2d 584 (1941).

[101] 236 N.Y. 581, 142 N.E. 292 (1923).

[102] Ibid. But see Solotaire v. Cowles, 107 N.Y.S.2d 798 (Sup. Ct. Westchester County 1951).

[103] 242 N.Y. 208, 151 N.E. 209 (1926), 44 A.L.R. 1419, 11 Cornell L.Q. 568 (1926), 40 Harv. L. Rev. 323 (1926), 25 Mich. L. Rev. 551 (1927), 35 Yale L.J. 1021 (1926).

tiff, Mrs. Doris Keane Sydney, a well-known actress, without alleging special damage, complained of the following words which appeared with her picture:[104]

> 'Doris Keane is, according to rumor, "Fatty" Arbuckle's latest lady love. Doris is pretty and "Fatty" is cross, or was when some of those prying newspapermen attempted to interview him about the reported match.'
>
> * * *
>
> 'Maybe Roscoe ("Fatty") Arbuckle is going to marry Doris Keane and maybe he is not.'

In her complaint, plaintiff alleged, *inter alia*, the extrinsic fact that she was a married woman.

The lower courts granted the defendant's motion for judgment on the pleadings.[105] In the Court of Appeals, the defendant urged that if the words were not libelous *per se*, special damages must be pleaded, that the Court would not go beyond the words themselves to determine whether they were libelous *per se*, and that the article nowhere mentioned that plaintiff was a married woman.[106] The Court of Appeals (4-2) reversed, citing the *O'Connell* case for the proposition that "As no special damage was pleaded, the plaintiff can only maintain her complaint, which alleged all the above facts by establishing that this article is libelous *per se*."[107]

The Court then pointed out that to say of a married woman that she is another man's latest lady love and that there is a reported agreement between them to marry cannot help but have the tendency to disgrace her and that such a publication is libelous *per se*:[108]

> It has been suggested that this article says nothing about Doris Keane being married. This is true. Neither does it say she is alive, or of age, or a woman capable of being married. It speaks of Doris Keane and gives her picture. This draws with it all that Doris Keane is—her standing, her position in society, and her relationship in life. . . .

Again, no special damage was required where the extrinsic facts, by supplying the plaintiff's marital status, rendered published matter non-

---

104 Id. at 211, 151 N.E. at 209, 44 A.L.R. at 1421.

105 215 App. Div. 653, 211 N.Y. Supp. 899 (1st Dep't 1925).

106 242 N.Y. 208, 213, 151 N.E. 209, 211 (1926).

107 Id. at 211, 151 N.E. at 210, 44 A.L.R. at 1421. Pound, J., and Hiscock, Ch. J., dissented on the ground that the article was not defamatory on its face but could be defamatory only on the basis of the extrinsic facts that the plaintiff was a married woman or that "Fatty" Arbuckle was a notorious lover, and that libel-by-extrinsic-fact was, by the "well established" rule, actionable only on a showing of special damage, adding that if "the court were prepared to take judicial notice of the bad reputation of Fatty Arbuckle, the case might be brought under the rule of the Gates Case (155 N.Y. 228), where the then bad character of Coney Island dance halls was recognized." 242 N.Y. 208, 216, 151 N.E. 209, 211 (1926).

108 Id. at 213, 151 N.E. at 210, 44 A.L.R. at 1422. See Spector v. News Syndicate Co., 280 N.Y. 346, 21 N.E.2d 185 (1939).

defamatory on its face, capable of only a defamatory construction, *viz.*, imputation of unchastity.

In *Henry v. New York Post, Inc.*,[109] the defendant had reported that one Reuter was being sued for separation by his wife, the former musical comedy star, Louise Henry, who charged that "her husband's brutalities wrecked the health of their son, Robert, seven. . . ." The article was accompanied by the plaintiff's picture. The plaintiff alleged that she was not and never had been married to Reuter or cohabited with him or borne him a child, but alleged no special damage. The defendant urged that the charge of the trial court that the words were libelous was erroneous. The judgment for the plaintiff was affirmed by the Court of Appeals. Here, again, special damage was not required where the extrinsic fact relating to the plaintiff's marital status made the published matter clearly defamatory by imputing unchastity.

Although in none of these three cases did the Court of Appeals choose to overrule the "rule" of the *O'Connell* case, the Court clearly revealed that the rule was narrower than originally enunciated. The three cases established, at least, that when the extrinsic facts dealt with the plaintiff's marital status and when the published matter together with such facts amounted to the clearly defamatory charge of lack of chastity, special damage was not required.

In *Braun v. Armour & Co.*,[110] the defendant published an advertisement purporting to set forth the names of dealers in its meat products and stating " 'These progressive dealers listed here sell Armours Star Bacon in the new window-top carton.' "[111] Included in the list of dealers were the plaintiff's name and the address of his market. The plaintiff sued for libel alleging in his complaint that he was a dealer in solely kosher meat products in keeping with the tenets of the Orthodox Jewish faith and that bacon was a nonkosher meat product. No special damage was alleged. The lower courts denied the defendant's motion to dismiss.[112] On appeal to the Court of Appeals, the question was certified: "Does the complaint state facts sufficient to constitute a cause of action?" The Court of Appeals, holding that the complaint stated a cause of action, affirmed.

---

109 280 N.Y. 842, 21 N.E.2d 887 (1939); see also Rovira v. Boget, 240 N.Y. 314, 148 N.E. 534 (1925).

110 254 N.Y. 514, 173 N.E. 845 (1930).

111 Id. at 515, 173 N.E. at 845. Cf. Kleeberg v. Sipser, 265 N.Y. 87, 191 N.E. 845 (1934); Blake v. Sun Printing and Publishing Ass'n, 229 N.Y. 515, 129 N.E. 897 (1920). See also Cohen v. Eisenberg, 173 Misc. 1089, 19 N.Y.S.2d 678 (Sup. Ct. N.Y. County 1940), aff'd without opinion, 260 App. Div. 1014, 24 N.Y.S.2d 1004 (1st Dep't 1940), motion for leave to appeal and for rehearing denied, 261 App. Div. 890, 25 N.Y.S.2d 995 (1st Dep't 1941) (oral statement in kosher meat market that non-kosher goods were sold held to constitute slander per se). See note 17 supra.

112 228 App. Div. 630, 237 N.Y. Supp. 733 (2d Dep't 1929).

Again the Court of Appeals rejected an opportunity to discredit the "rule" of the *O'Connell* case, but instead further narrowed its application. It was now clear that special damage was not necessary where the extrinsic facts bore on the plaintiff's business (the fact of plaintiff's status as a kosher meat dealer and the fact, probably sufficiently well-known to be deserving of judicial notice, that bacon is a nonkosher meat product) and made the published matter clearly defamatory as tending to injure one in one's calling.

In *Ben-Oliel v. Press Publishing Co.*,[113] decided the year before *Braun v. Armour & Co.*, plaintiff, a professional lecturer holding herself out as an authority on Palestine, sued for libel. The basis for her action was an article dealing with Palestinian marriage customs published by the defendants and falsely represented as being written by her. The plaintiff claimed that her reputation was injured because the article purported to set forth scientific facts and considered opinions concernning Palestine which were falsely represented, that such customs never existed and because anyone with knowledge of Palestine would recognize the specious nature of the article and conclude that the plaintiff was a charlatan. There was no allegation of special damage.

The defendant, relying upon the *O'Connell*, *Crashley*, and *Van Heusen* cases, was successful in having the complaint dismissed in the lower courts.[114]

The Court of Appeals unanimously reversed:[115]

> The statement of these facts as coming from a skilled traveler and observer makes her out ridiculous, a fraud, a deceiver and a charlatan. Everybody acquainted with life in Palestine knows that such customs do not and have not existed, and that the plaintiff, who represents herself in her profession as being historically accurate and learned on these subjects, is ignorant as well as stupid. In other words, the complaint alleges that the plaintiff makes her livelihood through her reputation as a writer and lecturer on the life in Palestine under the Mosaic law; that the

---

113 251 N.Y. 250, 167 N.E. 432 (1929), 7 N.Y.U.L.Q. Rev. 542 (1929). See also Clevenger v. Baker Voorhis & Co., 8 N.Y.2d 187, 168 N.E.2d 643, 203 N.Y.S.2d 812 (1960); D'Altamonte v. New York Herald Co., 154 App. Div. 453, 139 N.Y. Supp. 200 (1st Dep't 1913), modified on other grounds without opinion, 208 N.Y. 596, 102 N.E. 1101 (1913); Locke v. Benton & Bowles, 165 Misc. 631, 1 N.Y.S.2d 240 (Sup. Ct. N.Y. County 1937), rev'd, 253 App. Div. 369, 2 N.Y.S.2d 150 (1st Dep't 1938); Gershwin v. Ethical Publishing Co., 166 Misc. 39, 1 N.Y.S.2d 904 (N.Y. City Ct. 1937); Note, "False Imputation of Authorship," 72 U.S.L. Rev. 481 (1938); Wigmore, "The Right Against False Attribution of Belief or Utterance," 4 Ky. L.J., No. 8, p. 3 (1916). Cf. Macri v. Mayer, 22 Misc. 2d 429, 201 N.Y.S.2d 525 (Sup. Ct. N.Y. County 1960) (crediting authorship of successful advertising slogan by plaintiff to another held not actionable per se).

114 217 App. Div. 743, 216 N.Y. Supp. 801 (1st Dep't 1929).

115 251 N.Y. 250, 254-55, 167 N.E. 432, 433 (1929). Compare Gates v. New York Recorder Co., supra note 81 (reputation of Coney Island concert halls); D'Altamonte v. New York Herald Co., supra note 100 (African customs) with Crashley v. Press Publishing Co., supra note 55 (statutes of Brazil). But cf. O'Connell v. Press Publishing Co., supra note 90 (federal criminal statutes).

> defendant has falsely printed an article by her which makes her out a deceiver, a falsifier, and holds her up to ridicule and derision in the eyes of all those in any way acquainted with the land, its people and its past.

Here the controlling extrinsic facts did not deal with the plaintiff's marital status or, except to spell out what was already inferrible from her imputed authorship of the article, her professional status. Nor were the marriage customs of Palestine so widely known as to be the subject of judicial notice. Yet special damage was not required. The published matter and extrinsic facts, however, were capable of only a defamatory meaning—unfitness for one's calling.

Again in 1945 the Court of Appeals was presented with the opportunity to clarify the libel-by-extrinsic-fact rule in *Balabanoff v. Hearst Consol. Publications, Inc.*[116] The defendant had published an article which contained the following:[117]

> 'Mussolini found haven in Lausanne and a job sweeping out the Cafe le Lion d'Or, hangout for Russian revolutionaries, then headed by Angelica Balabanoff, who was later to become Secretary to the dread Cheka.'

The plaintiff, without alleging special damage, asserted in her complaint: that the defendants and the public generally understood that the word "Che-ka" was formed from the initials of the Russian words "Extraordinary Commission" which organization was formed in 1917 to crush any counterrevolutionary forces in Russia; that its activities extended to summary arrest, judgment, and execution; and that "the very name 'Cheka' became a word of terror, and . . . that its officers and leaders were looked at askance, with distrust, apprehension, contumely, scorn, fear, resentment and vengeance. . . ."[118]

Special Term refused to dismiss the complaint, but this refusal was reversed by the Appellate Division.[119] In the Court of Appeals, the defendant argued that the words were not libelous apart from the extrinsic facts alleged, in which case special damages were required to sustain the complaint.[120] In reversing the Appellate Division and upholding the complaint, the Court of Appeals said:[121]

> Concededly, the plaintiff has alleged no special damage. This, however, is not fatal as it is well established that a complaint in a libel action is sufficient if the false publication complained of is libelous per se. [Citing *Sydney v. Macfadden Newspaper Publishing Corp.; O'Connell v. Press Publishing Co.*]

116 294 N.Y. 351, 62 N.E.2d 599 (1945).
117 Id. at 353, 62 N.E.2d at 599.
118 Id. at 353-54, 62 N.E.2d at 600.
119 268 App. Div. 1040, 52 N.Y.S.2d 325 (2d Dep't 1945).
120 294 N.Y. 351, 352, 62 N.E.2d 599, 600 (1945).
121 Id. at 354-56, 62 N.E.2d at 600-01.

> The test applicable to the sufficiency of the complaint narrows down then to the single proposition of whether the publication complained of is libelous per se.
>
> * * *
>
> The article in question goes much further than merely charging appellant with having been an officer or agent of a foreign government. She is charged with association with Mussolini in a hangout for Russian revolutionaries, headed by her, as well as later becoming secretary to the dread 'Cheka.'
>
> * * *
>
> The allegations of the complaint describing the organization, functions and practices of the 'Cheka' are essential to an understanding of the significance of the language of the subject publication and do not, in our opinion, constitute extrinsic facts of such a character as to necessitate allegations of special damage.
>
> Given a fair reading, we feel that the article in question, taken in its entirety, fairly raises a question as to whether the plaintiff was held up to public contempt and disgrace; and, if so found, such an article is libelous per se without alleging special damages.
>
> * * *
>
> Whether the false publication in the instant case, in and of itself, is sufficient to bring the plaintiff into disrepute and subject her to the hatred and contempt of her friends and associates is a matter within the province of the jury, and we are unwilling to say, as a matter of law, that the language used is not libelous per se.

The statements in the opinion that the allegations in the complaint concerning the "Cheka" were essential to understanding the language of the published matter and that such allegations did not constitute extrinsic facts of such a character as to require special damage are somewhat ambiguous. A possible explanation is that the Court thought that such facts were sufficiently well-known to be entitled to judicial notice and that such allegations constituted an innuendo rather than an inducement. In any event, the actual holding is found in the final paragraphs of the opinion and is to the effect that the published matter "in and of itself" (by charging the plaintiff with having associated with Mussolini in a hangout for Russian revolutionaries, headed by her, and her later having become secretary to the dread "Cheka") was reasonably capable of defamatory meaning and therefore presented a question for the jury. This, then, was a case, in which extrinsic facts were not essential to the statement of a cause of action.

Since 1945, the Court of Appeals has decided no libel-by-extrinsic-fact case. In only three cases since 1945 has the Court even cited the *O'Connell* case and then only in support of other principles.[122]

---

122 Harwood Pharmacal Co. v. National Broadcasting Co., 9 N.Y.2d 460, 174 N.E.2d 602, 214 N.Y.S.2d 725 (1961) (concluding that complaint alleging making of statement which was libelous per se as to plaintiff corporation within the settled rule that makes the pleading

RESTATEMENT OF NEW YORK RULE

In no libel-by-extrinsic-fact case has the New York Court of Appeals actually dismissed a libel-by-extrinsic-fact complaint for failure to allege special damage. On the other hand, the *O'Connell* case has been often cited prior to 1945 and thrice since, and never overruled, by the Court of Appeals. Nevertheless, subsequent holdings by that Court have substantially restricted the broad language in the *O'Connell* opinion suggesting that special damage is required whenever extrinsic fact is necessary to render published matter defamatory. Therefore, the *O'Connell* rule must mean something less than requiring special damage in every case of libel-by-extrinsic-fact.

One obvious approach is to take the opposite extreme and to treat the *O'Connell* rule as dictum which has never been applied by the Court of Appeals and to dismiss it completely.[123] Under such an approach, any written publication which is defamatory, either on its face or by reference to extrinsic fact, would be actionable without special damage.[124] Such an approach ignores the fact that the *O'Connell* case frequently has been cited respectfully by the Court of Appeals and applied, in one way or another, by the lower New York courts.

Another approach has been to suggest that the New York libel-by-

---

of special damages unnecessary when the " 'language as a whole considered in its ordinary meaning, naturally and proximately was so injurious to the plaintiff that the court will presume without any proof that his reputation or credit has been thereby injured,' " citing O'Connell case); Tracy v. Newsday, Inc., 5 N.Y.2d 134, 155 N.E.2d 853, 182 N.Y.S.2d 1 (1959) (4-3) (citing O'Connell case as to function of innuendo); Macy v. New York World-Telegram Corp., 2 N.Y.2d 416, 141 N.E.2d 566, 161 N.Y.S.2d 55 (1957) (4-3) (dissenting opinion citing O'Connell case that to "establish his prima facie case [plaintiff] did not have to prove that he had been falsely accused of crime, but merely that the article tended naturally and proximately to disgrace him and hold him up to ridicule and contempt"). The New York law has been characterized as doubtful. Smith & Prosser, Cases on Torts 1064 (2d ed. 1957). See also 1 Harper & James, Torts 373, n. 8, 9 (1956); Developments in the Law-Defamation, 69 Harv. L. Rev. 875, 890 n. 96 (1956):

> In New York . . . two inconsistent court of appeals definitions apparently coexist. Compare O'Connell v. Press Publishing Co., 214 N.Y. 352, 108 N.E. 556 (1915), with Sydney v. MacFadden Newspaper Publishing Corp., 242 N.Y. 208, 151 N.E. 209 (1926). The lower courts seem to have chosen whichever line of authority they prefer. Compare S & R Motors, Inc. v. Gowens Motors, Inc., 139 N.Y.S.2d 212 (Sup. Ct. 1955), with de Figuerola v. McGraw-Hill Publishing Co., 189 Misc. 840, 74 N.Y.S.2d 448 (Sup. Ct. 1947). The court of appeals seems oblivious to the confusion, citing both definitions in a single case. See Balabanoff v. Hearst Consol. Publications, Inc., 294 N.Y. 351, 354, 62 N.E.2d 599, 600 (1945).

Seelman in his text, The Law of Libel and Slander in the State of New York, ch. II (1933), concludes that the rule of the O'Connell case was a clear case of judicial error, by a sbarply-divided court, without prior support, and not subsequently followed by the Court of Appeals, which should be corrected by the Court of Appeals. However, in a later supplement, Seelman refers to the O'Connell case as still the law of New York. Id. Par. 45 (Supp. 1960).

[123] Kuhn v. Veloz, 162 Misc. 948, 296 N.Y. Supp. 39 (Sup. Ct. N. Y. County 1937), rev'd, 252 App. Div. 515, 299 N.Y. Supp. 924 (1st Dep't 1937), 7 Brooklyn L. Rev. 250 (1937); Newman v. Reinhardt, 133 N.Y.L.J. No. 125, p. 3, col. 6-7 (Sup. Ct. N.Y. County 1955).

[124] See 3 Restatement, Torts § 569 (1938).

extrinsic-fact cases can be divided into those where the extrinsic fact related to the plaintiff's status and those where the extrinsic fact related to circumstances other than the plaintiff's status, with only the latter requiring special damage.[125] Although this distinction does tend to explain the *Smith*, *Sydney*, *Blake*, and *Braun* cases (assuming that in the latter case judicial notice could be taken of the fact that bacon is nonkosher), it does not fit the *Ben-Oliel* case at all. This approach can hardly be said to have been accepted as such by the New York lower courts.[126]

Still another approach is to require special damage not only in cases of libel-by-extrinsic-fact, but also in cases where an innuendo is required. This approach tends to confuse the innuendo and inducement and to follow the line of cases which use the term, defamatory "on its face," in its broader sense as denoting published matter which is defamatory without either assignment of meaning by innuendo or reference to extrinsic fact by inducement, rather than in the stricter sense of denoting published matter which is defamatory without reference to extrinsic fact by inducement.[127]

A final approach, which is consistent with the actual holdings of the Court of Appeals subsequent to the *O'Connell* case would be to require special damage only when the published matter and extrinsic fact alleged in the inducement did not amount to an imputation which, if classifiable as slander, would fit within one of the four categories of slander *per se*.[128] This approach reconciles all of the Court of Appeals

125 See Polikoff, Book Review, 84 U. Pa. L. Rev. 125 (1935); Carter and Hughes, Defamation Actions, 15-16 (P.L.I. 1957). See notes 17 and 43 supra.

126 Tower v. Crosby, 214 App. Div. 392, 212 N.Y. Supp. 219 (4th Dep't 1925); Rodger v. American Kennel Club, Inc., 131 Misc. 312, 226 N.Y. Supp. 451 (Sup. Ct. N.Y. County 1928), 21 Miss. L.J. 422 (1950), 25 N.Y.U.L. Rev. 416 (1950), 27 N.D.L. Rev. 61 (1951), 3 Okla. L. Rev. 446 (1950), 23 So. Cal. L. Rev. 618 (1950), 36 Va. L. Rev. 402 (1950). But see John-Fredericks, Inc. v. Abraham & Strauss, Inc., 269 App. Div. 693, 53 N.Y.S.2d 658 (2d Dep't 1945), reversing 39 N.Y.S.2d 979 (Sup. Ct. Kings County 1942); Harrison v. Winchell, 207 Misc. 275, 137 N.Y.S.2d 82 (Sup. Ct. N.Y. County 1955); Ferrand v. Brooklyn Daily Eagle, 90 N.Y.L.J. 2100, col. 2 (Sup. Ct. Kings County 1933), aff'd mem., 241 App. Div. 752, 270 N.Y. Supp. 966 (2d Dep't 1934).

127 Tanzer v. Crowley, 240 App. Div. 203, 268 N.Y. Supp. 620 (4th Dep't 1934); Sweet v. Ken, Inc., 169 Misc. 407, 7 N.Y.S.2d 737 (Sup. Ct. N.Y. County 1938); see also Davis v. Kelly, 172 App. Div. 171, 158 N.Y. Supp. 145 (1st Dep't 1916). See note 135 infra.

128 Dean Prosser suggested this distinction in 1955. Prosser, Torts 588 (2d ed. 1955). More recently, he has urged that this is the prevailing American rule. See note 11 supra. Dean Prosser states that two New York Court of Appeals decisions have held libel per quod to be actionable per se, citing the Sydney and Smith cases, but that earlier Court of Appeals cases have held to the contrary, citing the O'Connell, McNamara, and Crashley cases. He adds that the lower courts have consistently followed the O'Connell case and probably represent the present New York law which, he concludes, assimilates libel-by-extrinsic-fact to slander. Prosser "Libel Per Quod," 46 Va. L. Rev. 839, 846, n. 48 (1960). The present author has concluded that the holdings of the Court of Appeals are consistent with the assimilation of libel-by-extrinsic-fact to slander, but that the New York lower courts tend to require special damage in all cases of libel-by-extrinsic-fact. See also note 17 supra.

cases: the *Smith*, *Sydney*, *Henry*, and *Blake* cases as involving imputations of unchastity, and the *Braun* and *Ben-Oliel* cases as involving imputations of unfitness for one's calling. The *Balabanoff* case, like the pre-1915 *Gates* case, can be distinguished as involving facts capable of judicial notice and therefore not involving libel-by-extrinsic-fact at all.

Subsequent New York Lower Court Cases

While doubt may be expressed as to the vitality of the *O'Connell* case in the Court of Appeals, there is little question of its influence, erratic as that is, in the New York lower courts.

Some cases cite the *O'Connell* case for the well-established proposition that an innuendo is strictly limited to explaining equivocal matter and can not extend or enlarge such matter;[129] others cite it for a definition of libelous *per se*.[130] Still others rely on it for the "rule" that special damage is required whenever published matter is not libelous *per se*. Sometimes, this is said in the sense that where extrinsic facts are required, so also are special damages;[131] other times it is not.[132]

---

[129] Growman v. Globe Apartments, Inc., 283 App. Div. 1050, 131 N.Y.S.2d 498 (1st Dep't 1954); Stevens v. Whelan, 234 App. Div. 118, 254 N.Y. Supp. 272 (1st Dep't 1931); Samson Umited Corp. v. Dover Mfg. Co., 233 App. Div. 155, 251 N.Y. Supp. 466 (4th Dep't 1931); Kloor v. New York Herald Co., 200 App. Div. 90, 192 N.Y. Supp. 465 (2d Dep't 1922); Feely v. Vitagraph Co., 184 App. Div. 527, 172 N.Y. Supp. 264 (2d Dep't 1918); National Organization Masters, Mates & Pilots v. Curtis Publishing Co., 81 N.Y.S.2d 920 (Sup. Ct. N.Y. County 1948); Waldron v. Time, Inc., 83 N.Y.S.2d 826 (Sup. Ct. N.Y. County 1948), 1 Syracuse L. Rev. 162 (1949); Siegel v. Sun Printing & Publishing Ass'n, 130 Misc. 18, 223 N.Y. Supp. 549. (Sup. Ct. N.Y. County 1927); Hills v. Press Co., 122 Misc. 212, 202 N.Y. Supp. 678 (Sup. Ct. Albany County 1924).

[130] Tower v. Crosby, 214 App. Div. 392, 212 N.Y. Supp. 219 (4th Dep't 1925); Kloor v. New York Herald Co., 200 App. Div. 90, 192 N.Y. Supp. 465 (2d Dep't 1922).

[131] Frawley Chem. Corp. v. A. P. Larson Co., 274 App. Div. 643, 86 N.Y.S.2d 710 (1st Dep't 1949); Kuhn v. Veloz, 252 App. Div. 515, 299 N.Y. Supp. 924 (1st Dep't 1937), reversing 162 Misc. 948, 296 N.Y. Supp. 39 (Sup. Ct. N.Y. County 1937); Brodek v. Jones, 212 App. Div. 247, 208 N.Y. Supp. 699 (1st Dep't 1925); Toal v. Zito, 11 Misc. 2d 260, 171 N.Y.S.2d 393 (Sup. Ct. Nassau County 1958); Solotaire v. Cowles Magazines, Inc., 107 N.Y.S.2d 798 (Sup. Ct. Westchester County 1951); Cardiff v. Brooklyn Eagle, Inc., 190 Misc. 730, 75 N.Y.S.2d 222 (Sup. Ct. Kings County 1947); Harry Lee Publishing Co. v. Riverhead News, Inc., 180 Misc. 211, 40 N.Y.S.2d 899 (Sup. Ct. Queens County 1943); Werstein v. Postal Tel.-Cable Co., 131 Misc. 763, 227 N.Y. Supp. 729 (Sup. Ct. N.Y. County 1928); Rodger v. American Kennel Club, Inc., 131 Misc. 312, 226 N.Y. Supp. 451 (Sup. Ct. N.Y. County 1928). Only an occasional New York lower court case has held libel-by-extrinsic-fact actionable without special damage. John-Fredericks, Inc. v. Abraham & Strauss, Inc., 269 App. Div. 693, 53 N.Y.S.2d 658 (2d Dep't 1945), reversing 39 N.Y.S.2d 979 (Sup. Ct. Kings County 1942); Harrison v. Winchell, 207 Misc. 275, 137 N.Y.S.2d 82 (Sup. Ct. N.Y. County 1955); Newman v. Reinhardt, 133 N.Y.L.J., No. 125, p. 3, col. 6-7 (Sup. Ct. County 1955) (third cause of action), aff'd mem., 241 App. Div. 752, 270 N.Y. Supp. 966 (2d Dep't 1934); de Figuerola v. McGraw-Hill Publishing Co., 189 Misc. 840, 74 N.Y.S.2d 448 (Sup. Ct. N.Y. County 1947); Ferrand v. Brooklyn Daily Eagle, supra note 126; Brown v. New York Evening Journal, Inc., 143 Misc. 199, 255 N.Y. Supp. 403 (Sup. Ct. N.Y. County 1932), aff'd mem., 235 App. Div. 840, 257 N.Y. Supp. 903 (1st Dep't 1932); See also Callahan v. Israels, 140 Misc. 295, 250 N.Y. Supp. 470 (Sup. Ct. N.Y. County 1931); Kitograd v. Shapiro, 39 N.Y.S.2d 959 (N.Y. City Ct. 1943). No Appellate Division case refusing to follow the rule of the O'Connell case, except the memorandum reversal in John-Fredericks, Inc. v. Abraham & Strauss, Inc., supra, and the affirmances without opinion in Brown v. New York Evening Journal, Inc., supra, and Newman v. Rheinhardt, supra, has been found. One Supreme Court holding expressly

Except for a few isolated instances,[133] the lower courts have not consciously distinguished between libel-by-extrinsic-fact cases where the extrinsic fact related to the plaintiff's status and those where the extrinsic fact related to other circumstances. While some cases happen to fit such classification, so many cases are contrary that such classification is meaningless.[134]

In their confusion[135] the lower courts have ignored the one approach which is consistent with all the Court of Appeals holdings—the assimilation of libel-by-extrinsic-fact to slander.

Libel-by-Extrinsic-Fact in Other Jurisdictions

Except for those jurisdictions which follow the traditional rule that all published matter classifiable as libel is actionable without special damage,[136] the confusion over libel-by-extrinsic-fact is nationwide.

Some jurisdictions are in strict accord with the broad language of the *O'Connell* case, requiring special damage whenever the matter is so published as to be classifiable as libel and is not defamatory except by reference to extrinsic fact pleaded as inducement.[137] Other jurisdictions require special damage where both an inducement and an innuendo are required.[138] Still others extend the special damage requirement beyond

---

repudiating that rule as no longer law in the light of later appellate decisions was reversed by the Appellate Division. Kuhn v. Veloz, 162 Misc. 948, 296 N.Y. Supp. 39 (Sup. Ct. N.Y. County 1937), rev'd, 252 App. Div. 515, 299 N.Y. Supp. 924 (1st Dep't 1937). In the Court of Appeals libel-by-extrinsic-fact cases, the lower courts sometimes required special damages and other times did not. Thus, in Smith v. Smith, supra note 101, and Henry v. New York Post, Inc., supra note 109 (marital status cases), and Braun v. Armour & Co., supra note 110 (calling case), the plaintiff prevailed in the lower courts. However, in Sidney v. Macfadden Newspapers Publishing Corp., supra note 103 (marital status case), and Ben-Oliel v. Press Publishing Co., supra note 113 (calling case), the defendant prevailed in the lower courts. In Balabanoff v. Hearst Consol. Publications, Inc., supra note 116 (judicial notice case), the plaintiff prevailed at special term; the defendant in the Appellate Division. See Comment, "New York, Libel Per Quod, and Special Damages: An Unresolved Dilemma," 27 Fordham L. Rev. 405 (1958).

132 See, e.g., Hayes v. Van Gelder, 231 App. Div. 663, 248 N.Y. Supp. 393 (1st Dep't 1931); S. & R. Motors, Inc. v. Gowens Motors, Inc., 207 Misc. 890, 139 N.Y.S.2d 212 (Sup. Ct. Orange County 1955).

133 See note 126 supra.

134 Ibid.

135 While New York has its fair share of cases confusing innuendo and inducement, there is little judicial authority for the proposition that the special damage requirement applies to cases requiring an innuendo. Vigoda v. Marchbein, 195 N.Y.S.2d 863 (Sup. Ct. N.Y. County 1959); Richter v. Columbia Broadcasting System, Inc., 17 Misc. 2d 220, 186 N.Y.S.2d 322 (Sup. Ct. N.Y. County 1959), aff'd without opinion, 10 App. Div. 2d 826, 200 N.Y.S.2d 345 (1st Dep't 1960); Stillman v. Paramount Pictures Corp., 1 Misc. 2d 108, 147 N.Y.S.2d 504 (Sup. Ct. N.Y. County 1956), modified on other grounds, 2 App. Div. 2d 18, 153 N.Y.S.2d 190 (1st Dep't 1956) (4-1), aff'd without opinion, 5 N.Y.2d 994, 157 N.E.2d 728, 184 N.Y.S.2d 856 (1959). See note 127 supra and notes 44, 45 infra.

136 See, e.g., Hughes v. Samuels Bros., 179 Iowa 1077, 159 N.W. 589 (1916) (statutory basis); Herrmann v. Newark Morning Ledger Co., 48 N.J. Super. 420, 138 A.2d 61 (1958).

137 McBride v. Crowell-Collier Publishing Co., 196 F.2d 187 (5th Cir. 1952); Landstrom v. Thorpe, 189 F.2d 46 (8th Cir. 1951); see also Riley v. Dun & Bradstreet, Inc., 172 F.2d 303, 307, 308 (6th Cir. 1949). See note 42 supra.

138 Sharpe v. Larson, 70 Minn. 209, 72 N.W. 961 (1897).

libel-by-extrinsic-fact by requiring special damage whenever an innuendo is necessary regardless of whether an inducement is required.[139] Several jurisdictions are said to assimilate libel-by-extrinsic-fact to slander.[140] Many cases defy strict classification.[141]

Despite the judicial confusion there has been little statutory clarification. Occasionally, a general statutory definition of libel has been interpreted as dispensing with any special damage requirement for libel-by-extrinsic-fact.[142] California has codified some of the confusion by a statute requiring special damage whenever the libel is not "defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact."[143] England, which is

---

139 See note 44 supra.

140 Dean Prosser has urged this as the prevailing rule. See note 11 supra. Most of the cases which Dean Prosser cites in support of the fact that the courts are assimilating libel-by-extrinsic-fact to slander do not appear to be in point. Very few of them even involve libel-by-extrinsic-fact. Some of them say that in determining whether published written matter is libelous the categories of slander per se provide a guide because whatever, if oral, would be slanderous per se is, if written, a fortiori, libelous per se. Prosser, "Libel Per Quod," 46 Va. L. Rev. 839, 844, n. 20 (1960). Others hold that where an inducement or innuendo (or possibly even a colloquium) is required, the matter is not libelous per se. In various contexts and by using similar terms in various senses, most of them support the truism that published matter which does not constitute libel per se, or is not libelous per se, is not actionable per se and therefore requires allegation and proof of special damages. Neither the present nor proposed Restatement libel-by-extrinsic-fact rule restates prevailing judicial holdings. A more accurate re-restatement might read:

§ 569. Liability Without Proof of Special Harm.

(1) One who publishes defamatory matter is subject to liability without proof of special harm or loss of reputation if

(a) The publication is made in such a manner as to be classifiable as libel and, is itself, without reference to extrinsic facts, capable only of a defamatory meaning

(b) The publication is made in such a manner as to be classifiable as slander and imputes to another

(i) A criminal offense, as stated in § 571,

(ii) A loathsome disease, as stated in § 572,

(iii) Matter incompatible with his business, trade, profession or office, as stated in § 573, or

(iv) Unchastity on the part of a woman, as stated in § 574.

(2) One who publishes any other libel or slander is subject to liability only upon proof of special harm, as stated in § 575.

However, the rule being considered by Dean Prosser makes more sense and appears more desirable.

141 Schy v. Hearst Publishing Co., 205 F.2d 750 (7th Cir. 1953); Gundram v. Daily News Publishing Co., 175 Iowa 60, 156 N.W. 840 (1916); McDonald v. Lee, 246 Pa. 253, 92 Atl. 135 (1914); Whitaker v. Sherbrook Distrib. Co., 189 S.C. 243, 200 S.E. 848 (1939); Nichols v. Daily Reporter Co., 30 Utah 74, 83 Pac. 573 (1905).

142 See, e.g., Hughes v. Samuels Bros., 179 Iowa 1077, 159 N.W. 589 (1916) (statute defining criminal libel construed as abolishing special damage requirement for libel-by-extrinsic-fact). Cf. Guisti v. Galveston Tribune, 105 Tex. 497, 150 S.W. 874 (1912) (statute defining libel construed as eliminating special damage requirement where libel not per se because innuendo required).

143 Cal. Civ. Code Ann. § 45a (Deering 1960):

A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code.

Dean Prosser characterizes this statute as confirming the cases assimilating libel-by-extrinsic-fact to slander. However, the statute would appear to require special damage whenever published matter is not libelous on its face but necessitates explanatory matter, such as an

generally regarded as following the traditional general rule,[144] has recently provided some protection by statute for publishers who neither know nor have reasonable grounds for knowing the extrinsic facts necessary to render the published matter either applicable to the plaintiff or defamatory.[145]

CONCLUSION

The present confusion concerning libel-by-extrinsic-fact indicates that some reform is needed. This may be true of the entire law of defamation,[146] but at least in the other areas of defamation law most of the rules, while subject to criticism as to their soundness, do not share the added defect of being practically incomprehensible.

The easy solution of the libel-by-extrinsic-fact difficulties would be to revert to the traditional rule that all matter so published as to be classifiable as libel is actionable without special damage (without regard to the necessity of an inducement or an innuendo). This approach would afford the most substantial protection for a person's reputation, but would also subject publishers to the highest risks of defamation litigation and perpetuate the present advantage which libeled persons have over slandered persons, by renewing the importance of the somewhat artificial slander-libel distinction.

To a defamed person, it would seem to make little difference whether the defamatory meaning of a publication depends upon facts included in the published matter or upon extrinsic facts known to those to whom the matter is published. Injury to reputation can be as serious in the one case as the other, and the notoriety of the extrinsic facts among those to whom the matter is published can be considered by the jury in assessing damages.[147]

So far as publishers are concerned, the orthodox view is that they publish at their peril.[148] Defamation law traditionally has imposed non-

inducement, innuendo [sic] or other extrinsic fact, to render it defamatory of the plaintiff. In other words, special damage would be required in every case of libel-by-extrinsic-fact [see MacLeod v. Tribune Publishing Co., 52 Cal. 2d 536, 343 P.2d 36 (1959) (5-2)] and possibly also whenever an innuendo is required [see Peabody v. Barham, 52 Cal. App. 2d 581, 126 P.2d 668 (1942)].

144 Cassidy v. Daily Mirror Newspapers, Ltd. [1929] 2 K.B. 331, 69 A.L.R. 720.

145 The Defamation Act, 1952, 15 & 16 Geo. VI & 1 Eliz. II, c. 66, § 4.

146 For a précis of the principal reform proposals, see Prosser, Torts 595-96 (2d ed. 1955).

147 See Modisette & Adams v. Lorenze, 163 La. 505, 112 So. 397 (1927); Dall v. Time, Inc., 252 App. Div. 636, 300 N.Y. Supp. 680 (1st Dep't 1937); Developments in the Law-Defamation, 69 Harv. L. Rev. 875, 883-84 (1956).

148 The classic statement is by Holmes, J., in Peck v. Tribune Co., 214 U.S. 185, 189 (1909), quoting the dictum of Chief Justice Mansfield in the criminal libel case of Rex v. Woodfall, Lofft 776, 781, 98 Eng. Rep. 914, 916 (K.B. 1774):

"If the publication was libellous the defendant took the risk. As was said of such matters by Lord Mansfield, 'Whatever [sic: "Whenever" in original] a man publishes he publishes at his peril' . . . ."

fault liability, regardless of intention[149] or negligence.[150] This non-fault liability seems appropriate in the case of media of mass communication, which have such a vast potential of harm to individual reputation; here where corporate publishers have the ability to absorb the cost of defamation litigation as an inherent business expense, non-fault liability has more to recommend it than in other cases. But even in such a case, the application of the traditional rule to a publisher who neither knows nor has reason to know of the extrinsic facts involved seems harsh. As mentioned, a statute ameliorating this harsh effect to some extent has been enacted in England.[151]

This quotation was cited with approval by the Court of Appeals in Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 63, 126 N.E. 260, 262 (1920).

149 Prosser, Torts 601-04 (2d ed. 1955).

150 Prosser, Torts 604-06 (2d ed. 1955). Where published matter is nondefamatory on its face and becomes capable of a defamatory meaning only by reference to extrinsic fact, some authorities hold the publisher liable only when he knew or should have known of such extrinsic facts. An early New York case ruled, more or less by dictum, that a libel complaint charging a false publication that the plaintiff had married a named woman, and alleging the extrinsic fact that such woman was a public prostitute, should have averred that such extrinsic fact was known to the defendants at the time of the publication. Caldwell v. Raymond, 2 Abb. Pr. 193, 194, 196, 197 (N.Y. Sup. Ct. 1855). This case has been called sui generis. Seelman, The Law of Libel and Slander in the State of New York 37 (1933). A later case, however, avoided the Caldwell v. Raymond dictum, by finding that the publisher had been negligent in not knowing the extrinsic facts. Morey v. Morning Journal Ass'n, 1 N.Y. Supp. 475, 477 (Gen. Term, 5th Dep't 1888), aff'd, 123 N.Y. 207, 25 N.E. 161 (1890). The subsequent Court of Appeals libel-by-extrinsic-fact cases did not discuss the knowledge or lack of knowledge of the extrinsic facts on the part of the defendant. In some of them, at least, the defendant presumably had no such knowledge, but some inquiry might have disclosed such extrinsic facts. See also Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 126 N.E. 260 (1920) (fiction case involving elements of negligence). At least one subsequent lower court case has cited the Caldwell v. Raymond dictum with apparent approval. Campbell v. Cunningham Natural Gas Corp., 164 Misc. 1, 6-7, 298 N.Y. Supp. 200, 207 (Sup. Ct. Steuben County 1937) (Van Voorhis, J.). See Jones v. Polk Co., 190 Ala. 243, 67 So. 577 (1915), 29 Harv. L. Rev. 533 (1916) (holding that defendant must know or be negligent in not knowing defamatory imputation). Lack of negligence of the publisher in not being aware of the extrinsic facts was held immaterial in the Scottish case of Morrison v. Ritchie and Co., 4 Sess. Cas. 5th Ser. 645, 39 Scot. L. Rep. 432 (1902). A well-known English case held the publisher liable irrespective of whether he knew or should have known of the extrinsic fact. Cassidy v. Daily Mirror Newspapers, Ltd. [1929] 2 K.B. 331, 17 Calif. L. Rev. 684 (1929) 4 Camb. L.J. 75 (1930), 8 Can. B. Rev. 155 (1930), 18 Geo. L.J. 382 (1930), 25 Ill. L. Rev. 98 (1930), 64 Ir. L.T. 25 (1930), 14 Minn. L. Rev. 186 (1930), 10 Ore. L. Rev. 194 (1931), 73 Sol. J. 50 (1929), approved by Pollock and criticized by Holdsworth in 46 L.Q. Rev. 1, 133 (1930). It was argued unsuccessfully on an earlier dictum [Capital and Counties Bank v. Henty, 5 C.P.D. 514, 539 (1880)] that the extrinsic facts had to be "known both to the person who wrote the document and to the persons to whom it was published." The court (2-1) held the dictum inconsistent with the leading House of Lords case of Hulton & Co. v. Jones [1910] A.C. 20 (Artemus Jones case, which, of course, involved published matter defamatory on its face and not libel-by-extrinsic-fact). Greer, L.J., distinguished Hulton & Co. v. Jones in a vigorous dissent. The harshness of this rule in England has been ameliorated by statute, supra note 145. One American note writer has questioned whether the Cassidy case would be followed in the United States. Note, 25 Ill. L. Rev. 98, 99 (1930). It has been suggested that where the published matter is not defamatory on its face but becomes such by reference to extrinsic facts, the publisher should not be liable unless he knew such extrinsic facts or was negligent in not knowing them. See also Notes, 17 Calif. L. Rev. 684 (1929); 29 Harv. L. Rev. 533, 534-36 (1916); 25 Ill. L. Rev. 98, 99 (1930); 22 Jurid. Rev. 254, 259 (1910); 10 Ore. L. Rev. 194, 197 (1931). Contra, 3 Restatement, Torts § 580, comment c (1938). See, generally, Prosser, Torts § 94 (2d ed. 1955); 1 Harper & James, Torts 363-65 (1956).

151 See note 145 supra.

The traditional rule, while logically following the slander-libel distinction, does not note that in libel-by-extrinsic-fact, while the matter may be so published as to be classifiable as libel, the extrinsic facts which render the matter defamatory are not so published and, to such extent, resemble slander.[152] Thus, requiring special damage whenever an inducement is needed to show such extrinsic facts can be justified as a thorough-going adherence to the libel-slander distinction.

Even less defensible is the imposition of the special damage requirement whenever an innuendo is required, which tends to provide excessive immunity to publishers. Publishers would appear to be protected sufficiently by the present practice which requires the plaintiff to plead an innuendo whenever the published matter is reasonably capable of both defamatory and nondefamatory meanings. If the judge decides that the innuendo is properly inferrible from the published matter (with or without reference to pleaded extrinsic fact), it is for the jury to determine whether those to whom the matter was published understood it according to the meaning assigned by the plaintiff in his innuendo and to assess damages accordingly.[153] The jurisdictions defining "libel *per quod*" as any matter thus requiring an innuendo and adding the special damage requirement in this situation have created an extra pitfall for the injured individual and given the publisher a supernumerary advantage.

The literal application of the broad langnage of the *O'Connell* case, requiring the plaintiff to show special damages in all cases involving written matter which is only rendered defamatory by reference to extrinsic facts, leads to other undesirable results. It frequently immunizes publishers, including those who knew or should have known the extrinsic facts involved; this protection is at the expense of those plaintiffs who are unable to prove specific pecuniary loss, but whose reputations are no less seriously injured in the minds of those who knew the extrinsic facts, regardless of the fact that the extrinsic facts were not set forth as part of the published matter. Furthermore, the *O'Connell* "rule" creates somewhat of a dilemma since it places a greater burden in "libel-by-extrinsic-fact" cases than in "slander-by-extrinsic-fact" cases. Where resort to extrinsic facts is necessary to show that orally published matter communicates an imputation which is within one of the four slander *per se* categories, the plaintiff, as previously dis-

152 See note 40 supra. Requiring special damage is an overly-cautious way of requiring proof that some person or persons to whom the published matter was published also knew the extrinsic facts. See note 147 supra.

153 See notes 35-37 supra. The cases requiring special damage where an innuendo is pleaded may be groping for evidence that the persons to whom the published matter was published actually construed it in a defamatory sense. See note 143 supra.

cussed, is not required to allege or prove special damage to establish his cause of action. Therefore, to require special damage in all "libel-by-extrinsic-fact" cases, including those involving imputations of serious crime, loathsome disease, unfitness for one's calling, or unchastity, violates the maxim that any communication which is actionable if so published as to be classifiable as slander is, *a fortiori*, actionable if so published as to be classifiable as libel.

This dilemma suggests the following proper limitation to any "libel-by-extrinsic-fact rule": The plaintiff should be required to allege and prove special damage only when the published matter and extrinsic fact taken together amount to an imputation which, if classifiable as slander, would not be within one of the four slander *per se* categories. This limitation reasonably balances the conflicting interests of individual reputation and freedom of expression, does not violate the "actionable-as-slander-*a-fortiori*-actionable-as-libel" maxim, is consistent with some court holdings even though the limitation is not articulated in such opinions, and recognizes that in defamation-by-extrinsic-fact, the slander-libel distinction, which turns on how the published matter alone is published, supports application of the slander rule.

In effect, any libel-by-extrinsic-fact rule, to the extent that it requires special damage, can be said to represent: (1) an exception to the traditional rule of libel, (2) a device to narrow actionable libel, (3) the establishment of a third subdivision of defamation (in addition to slander and libel) known as "libel-by-extrinsic-fact," and (4) the assimilation of libel-by-extrinsic-fact to slander.

The traditional slander-libel distinction has been much criticized, but those favoring its abolition have disagreed as to whether slander should be assimilated to libel[154] or libel assimilated to slander.[155] So long as the distinction does survive, the assimilation of libel-by-extrinsic-fact to slander would appear to be a satisfactory compromise. Realistically restated, this would abolish the libel-by-extrinsic-fact rule since in the cases so denominated the defamation is made out by the published matter only by reference to extrinsic fact extraneous to such matter, such extrinsic fact being classifiable more accurately as slander than as libel.

"Defamation-by-extrinsic-fact" would be a more apt description.

---

154 Paton, "Reform and the English Law of Defamation," 33 Ill. L. Rev. 669 (1939). See note 12 supra.

155 The English Press Union Bill of 1938, which was not passed by Parliament, adopted an approach much like the assimilation of libel to slander. For a discussion of this, and other reform proposals, see Donnelly, "The Law of Defamation: Proposals for Reform," 33 Minn. L. Rev. 609 (1949); see also Courtney, "Absurdities of the Law of Slander and Libel," 36 Am. L. Rev. 552 (1902).