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New York, Libel Per Quod, and Special Damages: An Unresolved Dilemma

Committee amended the bill to permit only a reasonable delay, in which form the bill was passed by the Senate. Congress adjourned before a compromise between the two versions could be made.

It is reasonable to predict that Congress will enact some legislation in the next session to modify the *McNabb* rule. If the Senate version of the proposed legislation is finally enacted it is doubtful that it would have much effect on the present status of the doctrine. It is difficult to conceive that the Court would find any delay as reasonable in the light of its past decisions. If the legislation takes the form of the House bill then the *McNabb* rule would become only historically significant. However, in view of the determination of the Court to thwart improper police tactics it is entirely possible that the due process limitation of the Supreme Court doctrine would be extended to include delay in arraignment type situations.[63] It has been suggested[64] that such a development would eliminate the double standard of the *McNabb* rule and rest the attitude of the Court toward delay in arraignment upon sound constitutional grounds.

NEW YORK, LIBEL PER QUOD, AND SPECIAL DAMAGES: AN UNRESOLVED DILEMMA

It is generally accepted that when a publication is defamatory of the plaintiff upon its face it is actionable without proof of special damages,[1] or more briefly, that a libel per se is actionable per se. Traditionally, a publication libelous *per quod,* i.e., where it is necessary for the party libeled to plead extrinsic facts to show the defamation, was also, on proof of the extrinsic facts, actionable per se.[2] While this traditional view is still adhered to in some states,[3] other jurisdictions distinguish the two types of libel and require a different form of pleading for each.[4] The usual approach in the latter jurisdictions is to treat libel *per quod* in a category with slander, that is, with the exception of certain types of defamatory imputations, to make it actionable only after proof of special damage.[5]

63. See note 61 supra.

64. Keeffe, Comments on the Supreme Court's Treatment of the Bill of Rights in the October 1956 Term, 26 Fordham L. Rev. 468, 499 (1957).

1. Prosser, Torts § 93, at 587 (2d ed. 1955).

2. Ibid.

3. Klein v. Sunbeam Corp., 8 Terry 526, 94 A.2d 385 (Del. 1952), aff'd, 95 A.2d 460 (Del. 1953); Hughes v. Samuels Bros., 179 Iowa 1077, 159 N.W. 589 (1916).

4. Foley v. Hoffman, 188 Md. 273, 52 A.2d 476 (1947); Justin v. Evening Press Co., 172 Mich. 311, 137 N.W. 674 (1912).

5. The classes of oral defamations which are deemed to be slanderous per se are those making the imputations of crime, or a loathsome disease, and those affecting the plaintiff in his business, trade or profession. More recently, by statute or case decision, imputations of unchastity to a woman have been made slanderous per se. N.Y.R. Civ. Prac. 97. See Prosser, op. cit. supra note 1, § 93. See also note 12 infra.

Statements of the New York law on this subject have, for some time now, been confused and confusing. One authority has suggested that New York now adheres to the traditional view and considers all libel actionable per se.[6] However, the New York Court of Appeals in 1915 took a contrary position, stating in *O'Connell v. The Press Publishing Co.*[7] that where a publication is not libelous on its face "the facts showing . . . damage must be fully and specifically set forth in the complaint. General allegations of damage are not sufficient."[8] It is the purpose of this comment to consider the validity of the *O'Connell* decision and inquire into its present status as the law of New York.

The *O'Connell* case was concerned with a newspaper publication of an alleged libel. The court held as a matter of law that the publication was not libelous per se.[9] It accepted as settled New York law that a publication, not defamatory upon its face, imposes liability only for the pecuniary damage resulting from the defamation and that a plaintiff, to recover these damages, must specifically plead and prove them. The *O'Connell* opinion made no attempt to review the merits of the issue before the court but, in holding that an action for libel *per quod* required proof of special damage, the court relied solely on four prior New York decisions.[10] A re-examination of these decisions attests that the *O'Connell* case may rest on a very precarious foundation.

The first of the four cases cited was *Bassell v. Elmore*[11] where the action was one for slander. It was shown that the defendant called the plaintiff a public prostitute. The statement was made prior to the passage of the New York statute which makes imputations of unchastity to a woman slanderous per se.[12] The court said that, since the complaint was not one charging slander per se, it was necessary for the plaintiff to allege special damage. The decision in the *Bassell* case was merely an affirmation of the general rule that actions for slander require proof of special damage, unless the slander charged is one that is categorized as slander per se.[13] It was not an appropriate precedent for the *O'Connell* holding if only for the fact that the latter case was an action for libel.

O'Connell also cited *Stone v. Cooper*.[14] The only issue before the court in the latter case was whether the publication sued upon was, in fact, a libel, although one of the concurring opinions is somewhat confusing[15] and appears

6. Prosser, op. cit. supra note 1, § 93, at 587.

7. 214 N.Y. 352, 108 N.E. 556 (1915).

8. Id. at 358, 108 N.E. at 557.

9. Ibid.

10. Ibid.

11. 48 N.Y. 561 (1872).

12. Laws of 1871 Chap. 219—An Act to provide redress for words imputing unchastity to a female. This act was passed on March 29, 1871. It did not operate to make the slander per se actionable because the slander was uttered in the year 1862 and the statute, by its terms, applied only to words spoken after the date of its passage.

13. See note 5 supra.

14. 2 Denio 293 (N.Y. 1845).

15. There were five separate opinions written in support of the defendant's contention. Only one of these made any reference to special damages.

to lend some support to the proposition that all libel is not per se actionable. The plaintiff did not introduce any extrinsic evidence to show the defamatory nature of the allegedly libelous publication. To sustain the action, therefore, it was necessary to find that the publication was libelous on its face. The Chancellor's opinion added:

> Where from the nature of the charge, therefore, in connection with other facts stated in the plaintiff's declaration, no . . . 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 in consequence of the publication of the false and unfounded charge.[16]

The opinion at this point was concerned with the distinction between that which is libelous, be it per se or *per quod,* and that which is not libelous. The reference to special damage, the only such reference in any of the opinions, was inserted because the Chancellor reasoned, proof of special damage by the plaintiff would tend to establish the defamatory nature of the publication. There was no discussion of the need to allege special damage once a libel has been proved. Yet it is for the latter point that the case was cited in the *O'Connell* decision.

Next in the line of *O'Connell* reliance was *Crashley v. Press Publishing Co.*[17] *Crashley* relied heavily upon *Stone v. Cooper.* It is, indeed, a mere reiteration of the *Stone* doctrine.[18] The confusion sometimes put upon the *Stone* opinion was thus continued by *Crashley.*

The *Crashley* case did not distinguish between libel per se and libel *per quod.* Rather, it held that once the defamatory nature of a publication is proved by extrinsic facts, there exists a libel per se.[19] Although *Crashley* never touched on the question of when a libel is actionable, it would seem that, since the case viewed all libel as libel per se, it would better support the proposition that all libel is actionable per se.

The fourth and final case cited in support of the *O'Connell* decision was *McNamara v. Goldan.*[20] There plaintiff, in an action for libel, proved that the defendant had falsely charged him with writing certain anonymous letters. Since neither the objectionable nature of the letters nor the name of the plaintiff was mentioned in the publication, the court held there was no libel per se and said, "It was, therefore, necessary for the plaintiff to include in his com-

16. 2 Denio at 300.

17. 179 N.Y. 27, 71 N.E. 258 (1904).

18. Id. at 34, 71 N.E. at 260. The court said: "The complaint, showing no publication actionable per se, is defective for alleging no special pecuniary damages." For this proposition it cited Stone v. Cooper. The problem in the Crashley case, as in the Stone case, was whether the publication sued upon was libelous. In neither case did the plaintiff succeed in proving a libel; therefore, the issue presented in the O'Connell case never arose.

19. 179 N.Y. at 34, 71 N.E. at 260. In its pertinent part, the opinion read: "[I]t is argued that the words in the article . . . were libelous per se. 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."

20. 194 N.Y. 315, 87 N.E. 440 (1909).

plaint allegations of extrinsic facts to show that the words used in the letter are actionable."[21] After recognizing this distinction between libel per se and libel *per quod,* the opinion continued, "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."[22] The only case cited as support for this proposition was *Crashley v. The Press Publishing Co.* which, as noted, does not really stand for this proposition at all. At any rate, the statement in the *McNamara* case that special damage must be pleaded in an action for libel *per quod* is dictum since the plaintiff therein failed to prove any libel. The *McNamara case* offers no valid basis for the *O'Connell* decision. But whatever its shortcomings, and however false or weak the premises upon which it rests,[23] *O'Connell v. The Press Publishing Co.* stands as law. In more recent years, however, other decisions, leaving unmolested the "settled" law of the *O'Connell* case, have emasculated its doctrine and have served to further confuse the law.

Eight years after the *O'Connell* decision, the court of appeals cast that holding in doubt by its memorandum decision in *Smith v. Smith.*[24] In the latter case the defendant filed an application for a marriage license stating therein that it was to be his first marriage and that he was not a divorced person. These statements, which were in no way defamatory upon their face, were published in several newspapers. The plaintiff brought an action for libel, alleging as a fact that she was once married to the defendant. Her contention was that the publication amounted to a statement that she had been his mistress during the time of their marriage. She alleged no special damage. The court of appeals affirmed an order denying defendant's motion for judgment on the pleadings, thus clearly suggesting that special damage need not be alleged even in those cases where the introduction of extrinsic facts is necessary to show a libel.

In *Sydney v. MacFadden,*[25] the court again appeared to retreat from the *O'Connell* rule. There, the defendant newspaper reported that Doris Keane, a well-known actress, was 'Fatty' Arbuckle's latest love interest and that there were rumors of marriage between them. The plaintiff, Doris Keane, was a married woman but she did not allege this fact. Neither did she allege any special damage. The court, relying on the *O'Connell* decision, said, "As no special damage was pleaded, the plaintiff can only maintain her complaint . . . by establishing this article is libelous per se."[26] Then it was decided that the publication sued upon was libelous per se in spite of the fact that the defamatory meaning depended entirely upon the extrinsic fact that Doris Keane was

21. Id. at 321, 87 N.E. at 442.

22. Id. at 321, 87 N.E. at 442 (emphasis added).

23. Mr. Seelman, in his work on The Law of Libel and Slander in the State of New York, says that the O'Connell rule that a libel, not defamatory upon its face, is actionable only after proof of special damage, is "without foundation in fact or law." Seelman, Libel and Slander ¶ 46 (1933).

24. 236 N.Y. 581, 142 N.E. 292 (1923).

25. 242 N.Y. 208, 151 N.E. 209 (1926).

26. Id. at 211, 151 N.E. at 210.

already married. The court recognized that the publication said nothing about Doris Keane being a married woman but reasoned that "neither does it say that 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."[27] It would appear that the court strained to find a libel per se in the *Sydney* case simply to escape the rule of the *O'Connell* decision. In so doing it had to confuse the distinction between libel per se and libel *per quod*.[28] In the *Sydney* case the court had an opportunity to reconsider and perhaps readjudicate the *O'Connell* rule but it chose to add bad logic to bad law and in so doing lent added weight to the unsound principle of *O'Connell*.

This full grown ambiguity was later illustrated in two lower court decisions. The first of these, *Kuhn v. Veloz*,[29] was similar to the *Sydney* case and might have been decided on the same principle. But the court here chose rather to rely strictly upon the *O'Connell* doctrine. The plaintiff in the *Kuhn* case was a fashion designer. An article, attributed to the defendants, was published along with a picture of the plaintiff. The article referred to her as "chief seamstress" for the actress, Yolanda Veloz. It stated further that the defendants, Frank and Yolanda Veloz, designed many of the growns described in the article. The plaintiff alleged extrinsic facts to establish that she was a well-known designer of gowns and had designed all the gowns described. Her contention was that the publication injured her in her occupation. She alleged no special damage. The court upheld the defendant's motion to dismiss the complaint for failure to state facts sufficient to constitute a cause of action. If precedent be controlling it would seem that the court might have applied the reasoning of the *Sydney* case, however faulty, to these facts. The plaintiff was named and her picture was published. Why did these not draw with them all that Kathryn Kuhn was, "her standing, her position in society, her relationship in life"? Should not this have been held to be libelous per se as was the libel in the *Sydney* case?

A second lower court decision confounded the confusion because on its facts it was substantially similar to *Smith v. Smith* and yet, unlike the *Smith* case, it justified its decision with the *O'Connell* rule. In *Solotaire v. Cowles Magazines, Inc.*,[30] it was shown that the defendant published a magazine article which described the plaintiff's husband as a bachelor. The plaintiff pleaded the fact of her marriage to the defendant, the fact that she had a 21 year old son, and the fact that she, her husband and her son had maintained a family

27. Id. at 213, 151 N.E. at 210.

28. The Sydney decision gave no indication as to how many facts about an individual the publication of his name or picture "draws with it." Would such a publication draw with it the fact that an individual had children, was a member of certain organizations, or was in a particular business or profession? If the mere publication of one's name and picture carries with it all facts concerning the person, then the concept of libel per quod would disappear in such cases. It is doubtful that the Sydney case was intended to so change the law.

29. 252 App. Div. 515, 299 N.Y. Supp. 924 (1st Dep't 1937).

30. 107 N.Y.S.2d 798 (Sup. Ct. 1951).

domicile for the past seventeen years. She did not plead special damage. Plaintiff's contention was that the article imputed unchastity to her by stating in effect that she and her husband were not really married. The court said, "When, however, extraneous facts must be shown to make a publication libelous, there is the concomitant requirement that pecuniary damage resulting from the publication be pleaded and proved,"[31] citing, of course, the *O'Connell* case.

In the *Kuhn* case the defamation was certainly one affecting the plaintiff in her business or calling in life. The defamation in the *Solotaire* case involved the imputation of unchastity to a woman. Thus these two cases produce the paradoxical result of denying a plaintiff recovery for the printed publication of words, which when orally published with the necessary extrinsic facts established, would be per se actionable as slander.[32] As between libel and slander, libel has always been considered the greater wrong, and yet here, for the same words, in the same circumstances, a plaintiff has a cause of action for slander but not for libel.

If it is not clear enough that the *O'Connell* case was unsound when decided, it is certain that its application has produced not only confusion but injustice. It protects the defamer at the expense of his victim. Is it not time for New York to remedy the unfortunate situation sired by the *O'Connell* rule? The remedy might well come in the form of an acceptance of the majority view that written statements which are libelous only after the allegation of extrinsic facts will be actionable per se where, if they had been spoken, they would be slander per se. In all other cases libel *per quod* would be actionable only after proof of special damage.[33] Such a compromise or modified view would take cognizance of the fact that when a libel does not appear on the face of a publication, it is often difficult to ascertain how many people understood its defamatory nature and, therefore, to ascertain to what degree the plaintiff was damaged. Yet, this view also recognizes that at times the nature of the libel is so serious that, as soon as it is established, damages may be presumed.

Whether the modification of the *O'Connell* decision can come through court action or must be left to the will of the legislature, the need for clarification of the law is apparent.

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31. Id. at 799.

32. Cruikshank v. Gordone, 118 N.Y. 178, 23 N.E. 457 (1890) (imputations tending to injure the plaintiff in his business or profession); Notaramuzzi v. Shevack, 108 N.Y.S.2d 172 (Sup. Ct. 1951); Pearlstein v. Draizin, 190 Misc. 27, 73 N.Y.S.2d 594 (Sup. Ct. 1947) (imputations of unchastity to a woman); Kraushaar v. La Vin, 181 Misc. 508, 42 N.Y.S.2d 857 (Sup. Ct. 1943).

33. See note 5 supra.