Fordham Law Review

Volume 30 | Issue 3 Article 7

1962

Libel Per Se in New York-O'Connell Revisited

LIBEL PER SE IN NEW YORK—O'CONNELL REVISITED

Since the case of *O'Connell v. Press Publishing Co.*,[1] New York cases have gone divergent ways to determine when a libelous statement should be actionable in the absence of an allegation of special damages. So inconsistent have been the cases[2] in their adherence to and their departure from the so-called *O'Connell* rule that whatever validity this rule may once have enjoyed, the principle generally thought to be the rule of the case is now, if still technically the law of libel in New York, thoroughly devitalized.[3]

Traditional Views on Libel Per Se

O'Connell explained that libel per se exists where "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 impaired."[4] It is significant that libel per se was not defined in *O'Connell* with reference to allegations in the complaint of extrinsic facts (inducement), of the defamatory meaning of the statement (innuendo), or of the fact that the statement was made concerning the plaintiff (colloquium).[5] The uncertainty cast upon the law by *O'Connell* arises solely from the following dictum:

> The appellant then invokes the *established rules of law* that . . . 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 . . . . [T]he facts showing such damage must be fully and specifically set forth in the complaint.[6]

The offending words in this dictum are "established rules of law".[7] They presuppose to be law what in New York had never previously been held to be the law. The cases cited in the opinion in support of the proposition that

1. 214 N.Y. 352, 108 N.E. 556 (1915).

2. See Comment, 27 Fordham L. Rev. 405 (1958).

3. "The third cause [of action] contains extrinsic matter explaining the quoted defamatory matter. . . . This case [O'Connell] is not generally followed." Newman v. Ad Reinhardt, 133 N.Y.L.J., June 28, 1955, p. 3, cols. 6-7 (unreported opinion of Sup. Ct., Nathan, J.), aff'd mem., 3 App. Div. 2d 909, 163 N.Y.S.2d 403 (1st Dep't 1957); "[A]lthough the Court of Appeals has not overruled the rule erroneously declared, it has not followed it. It has been followed in the lower courts by some justices and apparently disregarded by others . . . ." Seelman, Libel and Slander in the State of New York, § 43, at 51 (1933).

4. 214 N.Y. at 358, 108 N.E. at 557.

5. See notes 22-25 infra and accompanying text.

6. 214 N.Y. at 358, 108 N.E. at 557. (Emphasis added.)

7. "Whatever may have been the merits of the case, long since decided, the statement in the opinion . . . [that allegations of extrinsic facts require allegations of special damages] was without foundation in fact or law. . . . There was no authority in the state that if the plaintiff did plead extrinsic facts whereby the words became actionable, that he must plead special damage or fail in his action." Seelman, Libel and Slander in the State of New York § 46, at 51 (1933).

extrinsic facts require special damages do not support that proposition.[8]

There have been three traditional views on the law of libel per se: first, all libel is actionable even in the absence of allegations of special damages in the complaint;[9] second, when the defamation is established only with the aid of an allegation of extrinsic facts, of the defamatory meaning of the publication, or of the fact that the statement was made concerning plaintiff—*i.e.*, where the publication is not defamatory on its face, but defamatory per quod—an allegation of special damages is required to make the statement actionable;[10] third, when the defamation is established only with the aid of one of the three elements of libel per quod, but falls within one of the four categories[11] of slander which are actionable per se, the defamation is actionable even in the absence of special damages.[12] There is substantial authority[13] which would place New York within the second view, requiring special damages in *all* cases of libel per quod, solely by virtue of the *O'Connell* dictum.

Why Special Damages Were Required in O'Connell

The facts in *O'Connell* establish that the holding there was much narrower than the rule that libel by extrinsic facts requires special damages.

Plaintiff O'Connell had been a government witness before a federal grand jury. He had testified to being the inventor of a "corset spring" and to having been interviewed by one of the defendants, who was subsequently indicted by the grand jury for the fraudulent weighing and selling of sugar. Press Publishing Company, the defendant, had published an account of the federal indictment together with the testimony which O'Connell had given. Plaintiff's theory was that solely, by way of innuendo, the publication could reasonably be understood to mean that plaintiff was in some way implicated in the crime of the fraudulent weighing of sugar. Nowhere in the opinion does it appear that extrinsic facts were even alleged in the complaint. The court did not recognize inducement as determinative of the case, but specifically excluded the relevancy of extrinsic facts altogether, stating that "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

8. Ibid.

9. Restatement, Torts § 569 (1938).

10. The O'Connell dictum regarding the necessity of special damages has been construed by subsequent cases to require special damages for all species of libel per quod.

11. The four categories of slander are imputations of: unchastity to a woman, affliction with a loathsome disease, the commission of a crime, professional business incompetence or malpractice.

12. Foley v. Hoffman, 188 Md. 273, 52 A.2d 476 (1947).

13. E.g., Seelman, Libel and Slander in the State of New York § 46, at 51 (1933). Only two of the elements of libel per quod were referred to in the O'Connell opinion: inducement and innuendo. The statement in regard to inducement was not determinative of the result. The innuendo in the complaint was held, however, to require special damages. The case did not hold that libel per quod universally requires allegations of special damages, though it has frequently been cited for this proposition.

of extrinsic facts is necessary."[14] The publication in this instance was found not to be libelous per se solely because the innuendoes of the complaint contravened the ordinary meaning of the publication:

> 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 matter set forth, but to explain the application of the words used.[15]

Thus *O'Connell* set out what might aptly be called the rule of ordinary meaning.[16] The holding was cast not in terms of extrinsic facts, but wholly in terms of a faulty innuendo. The innuendoes of the complaint were unwarranted because they sought to "graft a meaning" upon the ordinary meaning. The "language as a whole, considered in its ordinary meaning" was not defamatory of the plaintiff. This is far from holding that any allegation of inducement, innuendo, or colloquium is fatal to the status of libel per se. Special damages were essential in this case only because the innuendo was improper, and only because it sought to give the language of the publication "a broader application" than its ordinary meaning. Further, *O'Connell*, in its own words,[17] was not concerned with extrinsic facts in reaching the result it did. Consequently, anything which it had previously said about extrinsic facts was merely dicta.[18]

The "Ordinary Meaning" Rule

It is implicit in the *O'Connell* holding that where the innuendo merely seeks to explain the fair import of the statement, such innuendo does not require special damages provided that the publication is otherwise libelous. Only where the innuendo seeks to "graft a meaning" are special damages required. Still less did *O'Connell's* holding make inducement a bar to libel per se.[19] In a situation where the ordinary meaning is not readily apparent without the use of innuendo, where the only function of the innuendo is to explain the ordinary meaning and in so doing also expose a latent defamatory meaning, such an innuendo should not require an allegation of special damages since it would merely "explain the application of the words used."[20] In the case of a cryptic publication,[21] on whose face the ordinary meaning is not readily apparent, the innuendo pleaded should not be fatal to libel per se.

It is impossible to reconcile the myriad of cases that have reached different

14. 214 N.Y. at 360, 108 N.E. at 558.

15. Id. at 360, 108 N.E. at 558.

16. More precisely the rule is: all libel is actionable per se whose ordinary meaning is defamatory. As will be seen, this rule embraces certain species of libel per quod and excludes others.

17. See note 13 supra and accompanying text.

18. See note 6 supra and accompanying text.

19. See note 13 supra and accompanying text.

20. 214 N.Y. at 360, 108 N.E. at 558.

21. E.g., Lasky v. Kempton, 285 App. Div. 1121, 140 N.Y.S.2d 526 (1st Dep't 1955) (per curiam).

results while supposedly adhering to the *O'Connell* rule, if that rule is taken to mean that all libel per quod requires an allegation of special damages. If, on the other hand, the *O'Connell* rule of ordinary meaning is expressly adopted,[22] the case is actually much less rigid and absolute than has been supposed by any of the courts which have heretofore considered it. With one exception,[23] all of the cases subsequent to *O'Connell* could be reconciled on the ground that, while some courts have found the elements of innuendo and inducement of value in determining the ordinary meaning of the allegedly defamatory publication,[24] other courts have found the ordinary meaning without them,[25] their only purpose being to extend the meaning of the publication without justification. On this ground, *O'Connell* might be criticized as being so generic as to say nothing. It is submitted, however, that if the ordinary meaning interpretation of *O'Connell* be accepted, the case has in reality established the most feasible guidepost possible for the determination of specific controversies,[26] without the rigid, mechanistic, and too often unrealistic restrictions that would obtain from blind adherence to principles of libel per quod. Courts may take notice of the fact that, while a statement may be perfectly innocent on its face, it may be in reality a bitter and derogatory satire. Judges should not be limited to the face of the publication in order to find the ordinary meaning; if the ordinary meaning be defamation, albeit not on the face of the publication, it should, in *O'Connell's* words,[27] be actionable per se.

Corollaries of the "Ordinary Meaning" Rule

The *O'Connell* case had merely said that where the ordinary meaning of a publication is libelous, it should be actionable without special damages. But where the ordinary meaning is not present or totally clear from the face of the publication, there are several inferences which must necessarily be drawn.

Inducement has been defined as extrinsic facts, not present on the face

22. In the latest decision of the court of appeals, Harwood Pharmacal Co. v. National Broadcasting Co., 9 N.Y.2d 460, 174 N.E.2d 602, 214 N.Y.S.2d 725 (1961), the O'Connell "ordinary meaning" definition of libel per se was cited. The court did not, however, repudiate the dictum in O'Connell regarding libel by extrinsic fact, and consequently the uncertainty of O'Connell remains.

23. The exception is apparent upon comparison of two cases: Smith v. Smith, 236 N.Y. 581, 142 N.E. 292 (1923) (memorandum decision) and Solotaire v. Cowles Magazines, Inc., 107 N.Y.S.2d 798 (Sup. Ct. 1951).

24. E.g., Balabanoff v. Hearst Consol. Publications, Inc., 294 N.Y. 351, 62 N.E.2d 599 (1945).

25. E.g., Smith v. Staten Island Advance Co., 194 Misc. 299, 87 N.Y.S.2d 847 (Sup. Ct. 1949), aff'd mem., 276 App. Div. 978, 95 N.Y.S.2d 188 (2d Dep't 1950).

26. The "ordinary meaning" rule is one of interpretation; the rule that libel by extrinsic fact or innuendo requires special damage is one of unseeing logic. The difficulty with the latter rule is that it is too often insensitive to the more subtle ways by which a defamation may be accomplished.

27. 214 N.Y. at 358, 108 N.E. at 557.

of the publication, whose allegation is essential to the defamatory sense of the publication.[28] Where such facts are necessary or even of value for the total understanding of the language, or for establishing the ordinary meaning of the words used, they do not render necessary an allegation of special damages.[29] Innuendo is an allegation of the complaint which seeks to establish what was said as capable of a defamatory meaning.[30] If the innuendo is warranted, *i.e.*, if it seeks to do no more than to explain the application of the words used, as *O'Connell* described its function, in order to show their ordinary meaning or what a jury could reasonably find to be their ordinary meaning, it is not repugnant to libel per se under the "ordinary meaning" interpretation of *O'Connell*.[31] Colloquium is an allegation of the pleading which avers that the publication was made concerning the plaintiff, where, upon the face of the publication, plaintiff is not identified.[32] It would seem that, in view of Rule 96 of the Rules of Civil Practice,[33] this element should never be fatal to libel per se.[34] In any event, if it merely gives fullness to an understanding of the language, or aids in determining the ordinary meaning, which could be cleverly concealed through the use of allegorical or satirical devices, special damages should not be required to be pleaded. In other words, the elements of libel per quod should not universally require allegations of special damages, but only in those instances where the defamatory connotation which they seek to educe is outside the pale of possible ordinary meaning because unreasonable. Several cases since *O'Connell* have impliedly adopted such a position.

Subsequent Case Development

In *Sydney v. MacFadden Newspaper Publishing Corp.*,[35] the defendant published a statement concerning the plaintiff which, when taken with the extrinsic fact of her marriage, imputed unchastity to her. The court found a libel per se in spite of the extrinsic fact of plaintiff's marital status contained in the complaint. The opinion stated: "this [publication] . . . draws with it all that Doris Keane is,—her standing, her position in society, and

28. Cf. Prosser, Torts § 92, at 582 (2d ed. 1955).

29. E.g., Balabanoff v. Hearst Consol. Publications Inc., 294 N.Y. 351, 62 N.E.2d 599 (1945); de Figuerola v. McGraw-Hill Publishing Co., 189 Misc. 840, 74 N.Y.S.2d 448 (Sup. Ct. 1947), aff'd mem., 273 App. Div. 875, 78 N.Y.S.2d 197, appeal denied, 273 App. Div. 957, 78 N.Y.S.2d 924 (1st Dep't 1948).

30. Cf. Prosser, Torts § 92, at 582 (2d ed. 1955).

31. Cf. Sullivan v. Daily Mirror, Inc., 232 App. Div. 507, 250 N.Y. Supp. 420 (1st Dep't 1931).

32. Cf. Prosser, Torts § 92, at 583 (2d ed. 1955).

33. Rule 96 provides: "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." N.Y.R. Civ. Prac. 96.

34. Sydney v. MacFadden Newspaper Publishing Corp., 242 N.Y. 203, 151 N.E. 209 (1926).

35. Ibid.

her relationship in life . . . ."[36] In other words, the publication on its face was incomplete. Nevertheless, in the words of the *O'Connell* case, "the language as a whole, considered in its ordinary meaning . . ." was injurious to the plaintiff.[37] The only reconciliation possible between the *O'Connell* definition of a libel per se and the result reached in *Sydney* lies in the recognition of the fact that in the latter case the language could not be considered in its ordinary meaning absent the fact of plaintiff's marriage. The plaintiff, the court reasoned, should not be isolated from her situation in life.[38] This realistic decision recognized that neither the printed word nor an ordinary human being exists in an absolute vacuum. It went beyond the face of the publication to find the ordinary meaning thereof, and found it to be libelous by reason of the extrinsic fact of plaintiff's marriage.

Similarly, in the situation where a manufactured product is libeled in such a way as to impute to the manufacturer dishonesty or fraud, the courts have looked beyond the face of the publication in order to find the ordinary meaning thereof and have found it to be libelous with the aid of the extrinsic fact that the plaintiff was the manufacturer. In *Harwood Pharmacal Co. v. National Broadcasting Co.*,[39] plaintiff manufacturer was never mentioned in the libelous publication. However, a product called "Snooze" was spoken of by a television performer as fostering drug addiction, and was disparaged in other terms which exceeded the bounds of fair comment. In this situation, not merely the extrinsic fact that plaintiff was the manufacturer, but an innuendo alleging that the meaning was that plaintiff was guilty of deceit or dishonesty at the expense of the public, were required for the defamatory sense of the publication. In citing *O'Connell*, the court found the publication libelous per se. This result could not have been reached without the recognition that *O'Connell* held merely that only those publications are libelous per se whose ordinary meanings are libelous.[40] To find the ordinary meaning, the court had recourse to the extrinsic fact that plaintiff was the manufacturer and to the innuendo that the publication could easily be understood in such a light as to impute dishonesty to him.

Where the ordinary meaning is violated by the use of extrinsic fact or innuendo, special damages should be required. Thus, in *Ross v. MacFadden Publications, Inc.*,[41] a publication that plaintiff had died without leaving sufficient funds to provide for his children was held not to be libelous per se where the extrinsic fact that plaintiff operated a business was adduced as well as an innuendo that the publication imputed incompetence to him in his business. Significantly, the court relied on the *O'Connell* dictum that extrinsic

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

37. 214 N.Y. at 358, 108 N.E. at 557.

38. This is implied in the broad dictum cited in the text accompanying note 35 supra.

39. 9 N.Y.2d 460, 174 N.E.2d 602, 214 N.Y.S.2d 725 (1961). See also Tex Smith, The Harmonica Man, Inc. v. Godfrey, 198 Misc. 1006, 102 N.Y.S.2d 251 (Sup. Ct. 1951). But see Marlin Fire Arms Co. v. Shields, 171 N.Y. 384, 64 N.E. 163 (1902).

40. The court cited O'Connell for the proposition that the ordinary meaning is determinative on the question of libel per se.

41. 174 Misc. 1019, 22 N.Y.S.2d 519 (Sup. Ct. 1940).

facts require special damages. However, the same result could have been reached had the court simply chosen to say that the ordinary meaning of the statement did not extend as far as plaintiff alleged in his innuendo. Had the court utilized the "ordinary meaning" rule, it would not have held the extrinsic fact of plaintiff's business fatal, but rather the unwarranted innuendo, which sought in this instance to "graft a meaning" when the ordinary meaning was apparent.

Two further decisions will suffice as examples of situations where the ordinary meaning was found off the face of publications which were nevertheless held libelous per se. In *Balabanoff v. Hearst Consol. Publications Inc.*,[42] defendant published a statement alleging that plaintiff was a member of the "dread Checka." The court held:

> The allegations of the complaint describing the organization, functions and practices of the "Checka" 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. . . .[43]

What extrinsic facts then, would necessitate allegations of special damage? Obviously, those which would not be essential to an understanding of the significance of the language. In *de Figuerola v. McGraw-Hill Publishing Co.*,[44] the name of an Axis agent was printed beneath a picture of the plaintiff. The publication was held to be libelous per se in spite of the necessity of the extrinsic fact that the name was that of an Axis spy. Like *Sydney v. MacFadden Newspaper Publishing Corp.* and *Harwood Pharmacal Co. v. National Broadcasting Co.*, this is an example of a situation where the ordinary meaning of the publication included facts not present on the face of the article and where the ordinary meaning could not be arrived at without reference to such facts.

Where no extrinsic facts were pleaded to establish a defamation, but merely an innuendo, it was held in *Sullivan v. Daily Mirror, Inc.*,[45] that the innuendo did not require special damages. The court found the article libelous per se because "the publications justify the innuendo pleaded."[46] Obviously the publication could only justify the innuendo pleaded if the innuendo did not do violence to the ordinary meaning of the publication. "The test is whether to the mind of an intelligent man, the tenor of the article and the language used naturally import a criminal or disgraceful act."[47]

There are several recent lower court decisions whose reasoning seems to be in accord with the "ordinary meaning" interpretation of *O'Connell* and with its implications. In *Lasky v. Kempton*,[48] the court said:

42. 294 N.Y. 351, 62 N.E.2d 599 (1945).

43. Id. at 355, 62 N.E.2d at 601.

44. 89 Misc. 840, 74 N.Y.S.2d 448 (Sup. Ct. 1947), aff'd mem., 273 App. Div. 875, 78 N.Y.S.2d 197, appeal denied, 273 App. Div. 957, 78 N.Y.S.2d 924 (1st Dep't 1948).

45. 232 App. Div. 507, 250 N.Y. Supp. 420 (1st Dep't 1931).

46. Id. at 510, 250 N.Y. Supp. at 423.

47. Ibid.

48. 285 App. Div. 1121, 140 N.Y.S.2d 526 (1st Dep't 1955) (per curiam).

The article, written in a racy, hyperbolic style, is frequently cryptic in meaning . . . only dubiously suggestive of matters defaming plaintiff. Its meaning not being adequately clear, the necessity for a proper allegation of extrinsic fact or innuendo is evident. . . .[49]

In *Harrison v. Winchell*,[50] it was said, as it had been long before in *Sydney v. McFadden Newspaper Publishing Corp.*, "Both [matrimonial status and profession] are so-called extrinsic facts, but in my view neither is such an 'extrinsic fact' as to require special damages to be pleaded. . . ."[51] Finally, in *Larney v. Town & Village, Inc.*[52] the court, in holding a publication libelous per se said, "It is permissible for plaintiff to show . . . a libelous significance not discernible . . . by reason of what defendant had said . . . in other articles. . . ."[53]

Conclusion

Although the rule in *O'Connell* that extrinsic facts require an allegation of special damages has not been overruled, it is more often than not disregarded.[54] If *O'Connell* is to have any significance at all, its meaning should be expressed in terms of the holding—the rule of "ordinary meaning," basically a rule of interpretation of language. Obviously, the ordinary meaning of a publication is most apparent by reference to the publication itself. The further from the face of the publication the pleader must wander by way of inducement or innuendo in order to establish the defamatory meaning complained of, the more reluctant should the courts be to find the ordinary meaning apart from the face of the publication. Neither inducement nor innuendo should be controlling on the status of libel per se. What should control is the ordinary meaning, be it on the face or off the face of the publication. In the future, it is to be hoped that the court of appeals will expressly ratify the view which it has impliedly adopted, by reaffirming the *O'Connell* definition of libel per se in terms of ordinary meaning rather than in terms of the absolutes of libel per quod: inducement, innuendo, and colloquium.[55] The adoption by the New York courts of the ordinary meaning

49. Ibid.

50. 207 Misc. 275, 137 N.Y.S.2d 82 (Sup. Ct. 1955).

51. Id. at 281, 137 N.Y.S.2d at 86.

52. 133 N.Y.L.J., Feb. 2, 1955, p. 7, col. 3 (unreported opinion of Sup. Ct., Walter, J.).

53. Ibid.

54. Newman v. Ad Reinhardt, 133 N.Y.L.J., June 28, 1955, p. 3, cols. 6-7 (unreported opinion of Sup. Ct., Nathan, J.), aff'd mem., 3 App. Div. 2d 909, 163 N.Y.S.2d 403 (1st Dep't 1957).

55. The express adoption of the rule of "ordinary meaning," and the corresponding abandonment by New York of the traditional formulae of libel per quod as controlling would necessarily be a substantial departure from any present approach toward determining a libel per se. The trend of the most recent New York decisions has nonetheless been to determine the existence of a libel per se by the application of this simple and sensible rule of interpretation, and, to a large extent, to ignore the functional, iron-clad approach of looking to inducement, innuendo, or colloquium as controlling.