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Torts—Admissibility of Extrinsic Evidence as Proof of Libel Per Se

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waived for services performed prior to termination of his contract. Defendant asserted that this recovery should be further offset by the value of time and expenses saved the plaintiff by his termination, as in an action for breach of contract. The court rejected the contract measure of damages as inapplicable to an intentional tort, but added: "If defendants would offset the damages as claimed in the manner asserted, the burden rested upon them to affirmatively allege and offer proof upon such offset."[8] This statement would suggest that savings to an attorney of time and expense are deductible from his recovery in an action for intentional interference. But an attorney's fee is wholly composed of his time and expense; absent these items of recovery, an attorney would be limited to such items as damage to reputation, loss of future earnings, and mental anguish. Despite the court's recognition that "professional services ... [comprehend] many intangible values not wholly susceptible of proof,"[9] the fact remains that such damages would be extremely difficult to prove.

Regardless of the court's equivocal treatment of the issues of burden of proof and measure of damages, the position of the court as regards the integrity of the attorney-client relationship is clear. The decision in the principal case can leave no doubt that third parties will not be permitted to control the relationship between an attorney and his client.

Admissibility of Extrinsic Evidence as Proof of Libel Per Se. The dubious distinction between libel per se and libel per quod may be non-existent in Washington following a recent supreme court decision. Plaintiff was divorced from his former wife, Hazel, on February 3, 1960. In September 1960, he married his present wife. Thereafter plaintiff instituted a suit to modify the divorce decree. Defendant newspaper, in reporting this suit, printed the following statement: "Divorce Granted—Hazel M. Pitts from Phillip Pitts." Plaintiff sued defendant for libel, alleging that considering extrinsic facts the publication was libelous per se; it gave the impression that plaintiff's second marriage was illegal and that he was a bigamist. Defendant contended that the publication was not libelous per se and that plaintiff could not recover on the theory of a libel per quod since special damages had not been pleaded. On appeal from a judgment for plaintiff in the court below, *held:* False statements published in a newspaper concerning

[8] *Id.* at 147, 396 P.2d at 154.
[9] *Id.* at 147, 396 P.2d at 154.

betrothals, marriages, births, divorces, and custody of children may be shown to be libelous by proof of extrinsic circumstances and may thus become actionable without proof of special damages. *Pitts v. Spokane Chronicle Co.*, 63 Wn.2d 763, 388 P.2d 976 (1963).

Libels may be divided into classes, words which are libelous on their face, and words which, innocent on their face, are libelous only when extrinsic and surrounding circumstances are considered.[1] Historically, proof of special damages was not required in any action for libel whether it was in the first or second class. Thus, "the question is libel or no libel, and once it is determined that words are defamatory, damage is presumed as a matter of substantive law."[2] This is the accepted rule in England,[3] the position of the Restatement,[4] and the rule in a minority of American courts.[5] A substantial number of courts, however, departing from the historical growth of the law of libel, have held that if a publication is not libelous per se, plaintiff's recovery depends upon proof of special damage.[6] A libel which is not "libel per se" has been called "libel per quod."

The Washington court from an early period has followed the doctrine that plaintiff's recovery depends upon allegation and proof of special damages if a publication is not libelous per se.[7] However, an examination of the Washington case law quickly demonstrates that there is no clear and consistent agreement as to what is meant by the term "libelous per se."

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[1] 1 HARPER & JAMES, TORTS § 5.9 (1956).

[2] *Ibid.*

[3] Cassidy v. Daily Mirror Newspapers, Ltd., [1929] 2 K.B. 331, 69 A.L.R. 720 (1930).

[4] RESTATEMENT, TORTS § 569 (1934).

[5] *E.g.*, Martin v. Outboard Marine Corp., 15 Wis.2d 452, 113 N.W.2d 135 (1963); Herrmann v. Newark Morning Ledger, 48 N.J. Super. 420, 138 A.2d 61 (1958); Upton v. Times Democrat Publishing Co., 104 La. 141, 28 So. 970 (1900); Byram v. Aiken, 65 Minn. 87, 67 N.W. 807 (1896).

[6] *E.g.*, Brown v. National Home Ins. Co., 239 S.C. 488, 123 S.E.2d 850 (1962); Karrigan v. Valentine, 184 Kan. 783, 339 P.2d 52 (1959); Weaver v. Beneficial Fin. Co., 200 Va. 572, 106 S.E.2d 620 (1959); Thompson v. Upton, 218 Md. 433, 146 A.2d 880 (1958); Becker v. Toulmin, 165 Ohio 549, 138 N.E.2d 391 (1956); Broking v. Phoenix Newspapers, 76 Ariz. 334, 264 P.2d 413 (1953); Chase v. New Mexico Publishing Co., 53 N.M. 145, 203 P.2d 594 (1949); Creekmore v. Runnels, 359 Mo. 1020, 224 S.W.2d 1007 (1949); Griffin v. Opinion Publishing Co., 114 Mont. 502, 138 P.2d 580 (1943); Kinsley v. Herald & Globe Ass'n, 113 Vt. 272, 34 A.2d 99 (1943); Knapp v. Post Printing Publishing Co., 111 Colo. 492, 144 P.2d 981 (1943); Towles v. Travelers Ins. Co., 282 Ky. 147, 137 S.W.2d 1110 (1940); Dalton v. Woodward, 134 Neb. 915, 280 N.W. 215 (1938); Ellsworth v. Martindale-Hubbell Law Directory, 68 N.D. 425, 280 N.W. 879 (1938); Tulsa Tribune Co. v. Kight, 174 Okl. 359, 50 P.2d 350 (1935); Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933); Rachels v. Deener, 182 Ark. 931, 33 S.W.2d 39 (1930); Harrison v. Burger, 212 Ala. 670, 103 So. 842 (1925); Gustin v. Evening Press Co., 172 Mich. 311, 137 N.W. 674 (1912).

[7] Velikange v. Millichamp, 67 Wash. 138, 120 Pac. 876 (1912).

In a leading case, *Graham v. Star Publishing Co.*,[8] the court held that in order for a plaintiff to recover without proof of special damages, "the defamatory matter must be certain and apparent from the words themselves."[9] There is little merit in this rule that defamatory meaning must unequivocally appear on the face of a publication without resort to extrinsic circumstances. Since the interest to be protected is the "reputation" of the individual, it should make no difference whether the defamatory meaning of words appears on the face of the publication or can be shown only by resort to extrinsic circumstances. In both cases, the plaintiff has suffered injury to his reputation.

Moving away from this initial definition of libel per se, the Washington court stated, in *Purvis v. Bremer's, Inc.*,[10]

> A publication which tends to expose a living person to hatred, contempt, ridicule or obloquy, or to deprive him of benefit of public confidence or social intercourse, or to injure him in his business or occupation, is libelous per se.... The test actually is whether the language used concerning a person and his affairs must from its nature, or presumably will as its natural consequence, *occasion him pecuniary loss.... The matter of what constitues libel per se becomes, in many instances, a question of fact for the jury. This is particularly true where the words relied on as libelous per se depend upon innuendo or upon extrinsic circumstances....*[11]

What does this test mean? It apparently means that words, innocent on their face, may be shown to be "libelous per se" by reference to "innuendo" or extrinsic circumstances. Thus the *Graham* rule seems to be rejected. Any distinction between libel per se and libel per quod seems to have been blurred away, because it is virtually impossible to conceive of an actionable libel which does not fall within this broad test of "libel per se."[12]

The definition of "libel per se," like the test, appears to cover the whole field of defamatory publications. Thus, as used by the court in *Purvis*, the term "libel per se" was useful only to describe a result, namely, that recovery was allowed without proof of special damages.

In the principal case, the Washington court did not expressly reject the libel per se-libel per quod distinction. The court restated the long-standing Washington rule that alleged defamatory words must be

[8] 133 Wash. 387, 233 Pac. 625 (1925).
[9] *Id.* at 389, 233 Pac. at 626.
[10] 54 Wn.2d 743, 344 P.2d 705 (1959).
[11] 54 Wn.2d 743, 751-52, 344 P.2d 705, 710-11 (1959). (Emphasis added.)
[12] *But cf.*, Schwartz v. World Publishing Co., 57 Wn.2d 213, 216, 356 P.2d 97, 99 (1960) (Donworth, J., dissenting).

libelous per se to permit recovery without proof of special damages.[13] Since the publication was held to be libelous per se, it was unnecessary to prove special damages. However, after reciting the traditional Washington rule, the court approved the English rule,[14] and Restatement of Torts § 569,[15] in which special damages need not be proved in any action for libel. Thus, the court strongly indicated that the libel per se-libel per quod distinction will be rejected in subsequent decisions. Rejection of this purposeless and confusing distinction would indeed be welcome.

TRADE REGULATION

Consumer Protection Act—Operation Under Federal Consent Decree. In 1961 Washington joined those states which have enacted comprehensive trade regulation statutes.[1] The Washington Supreme Court recently sustained the constitutionality of this statute in an opinion which suggests that the law will have an active future. The state Attorney General brought an action to enjoin alleged monopolization by certain motion picture distributors and theatre owners of second run feature films in the Seattle area. The trial court sustained defendants' motion to dismiss for lack of jurisdiction over the subject matter on grounds that Congress had preempted trade regulation of interstate commerce, that the Washington act would interfere with and burden interstate commerce, and that defendants were excluded from coverage by the act's own terms. On appeal, the Washington Supreme Court reversed. *Held:* Federal antitrust statutes do not preempt the field of trade regulation so as to prohibit state regulation of business activities having sufficient local impact to justify exercise of state police power, even though these activities are an incidental part of interstate commerce. Section 17 of the Consumer Protection Act does not exempt combined interstate and intrastate activities which are subject to regulation—but not in fact regulated by—a federal officer, and does not include operation under federal consent decrees within the meaning of

[13] Velikange v. Millichamp, 67 Wash. 138, 120 Pac. 876 (1912).

[14] Cassidy v. Daily Mirror Newspapers, Ltd., [1929] 2 K.B. 331, 69 A.L.R. 720 (1930).

[15] "One who falsely, and without a privilege to do so, publishes matter defamatory to another in such a manner as to make the publication a libel is liable to the other although no special harm or loss of reputation results therefrom."

[1] Consumer Protection Act., WASH. REV. CODE ch. 19.86 (1961). The substantive features and enforcement procedures of the act are detailed in Dewell & Gittenger, *The Washington Antitrust Laws*, 36 WASH. L. REV. 239 (1961).