Libel and Libel Per Se

Jack F. Kuhlman

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation

Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol43/iss1/5

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.
The significance of this case is the fact that an imputation of false swearing does not have to amount to an accusation of perjury in order to be actionable per se. The words spoken do not need to refer to a judicial proceeding directly. However, it would appear that the accusation must clearly suggest that the plaintiff swore falsely while under oath.

Neal v. Burch is the only case this researcher has found to have been decided under section 2. The statement in question charged that the defendant had sworn to lie and that his affidavit was false. The declaration of the plaintiff had alleged that, under section 2 of the Slander and Libel Act, such an accusation was actionable per se. The court held that under section 2 it was not necessary to charge that the defendant's statements were made of and concerning any judicial proceeding or any action, time, or transaction requiring that an affidavit be made. It was sufficient that the utterance alleged false swearing in a general manner and not in connection with a particular occasion when the plaintiff was under oath.

There is little case law in Illinois dealing with this category since most of the suits involving such actionable words are brought against attorneys regarding their language in the courtroom. Such cases are resolved on the basis of the privilege granted to attorneys during a trial and, therefore, do not involve the actionability of the words in question.

MICHAEL D. SAVAGE

LIBEL AND LIBEL PER SE

LIBEL DEFINED

Libel is generally defined as "a malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule." Until January 1, 1962, a similar, though broader, definition could be found in the Illinois criminal statutes. This statutory definition of criminal libel was generally applicable to civil as well as criminal actions in Illinois. The most recent Illinois

---

2. Ill. Rev. Stat. ch. 38, § 402 (1961): "A libel is a malicious defamation, expressed either by printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation or publish the natural defects of one who is alive, and thereby expose him to public hatred, contempt, ridicule, or financial injury." Repealed by Ill. Rev. Stat. ch. 38, § 35-1 (1961). The 1961 Criminal Code does not define libel, but contains the offense of Criminal Defamation in Ill. Rev. Stat. ch. 38, § 27-1(a) (1961).
decision defining libel and slander is *Whitby v. Associates Discount Corporation*,\(^4\) wherein the Appellate Court recites the Restatement of Torts definition of defamation\(^5\) and then states that libel is a defamatory communication designed for visual perception, and slander is an oral defamatory communication.\(^6\)

**LIBEL PER SE—LIBEL PER QUOD**

The meanings of the expressions “libel per se” and “libel per quod” have eluded many law students and lawyers. A clear understanding of these terms and their applicability is essential to a discussion of the development of the law of libel in Illinois.

The common law rule was that all libel was actionable without the requirement of pleading or proving that the plaintiff had in fact suffered any damage as a result of it.\(^7\) However, in the development of this rule in the United States, a majority of jurisdictions came to distinguish between libel that was defamatory on its face, or “libel per se,” and libel not defamatory on its face, or “libel per quod.”\(^8\) In the former, damage was presumed; in the latter, the plaintiff was required to establish that he had suffered special damages to state a cause of action.

Illinois does not follow the common law rule stated above. As will be seen from the Illinois decisions, libel per se language in Illinois is that which is defamatory on its face, *i.e.*, where the words themselves, without resort to outside circumstances, tend to hold the plaintiff up to scorn, ridicule, contempt, and so forth, and are embodied in some permanent physical form. For example, in an 1891 case, the Supreme Court of Illinois held that words labelling the plaintiff as an “anarchist” were libelous per se because the public had feelings of hatred and contempt for persons advocating the overthrow of government;\(^9\) the words were therefore defamatory on their face. On the other hand, sixty years later an article naming a person as one of the “subversive leaders in the United States” was declared not defamatory on its face and therefore not libelous per se. In that case, the Appellate Court said that the words used did not charge the plaintiff with


\(^5\) “A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” 3 Restatement, Torts § 559 (1938).


\(^7\) Prosser, Torts 780 (3d ed. 1964). Prosser further notes that this is the English view, the law in a small minority of American jurisdictions, and the position adopted by the Restatement of Torts § 569. On whether or not this rule is a minority, majority, or “trend” in American jurisdictions, see Eldredge, *The Spurious Rule of Libel Per Quod*, 79 Harv. L. Rev. 733 (1966).

\(^8\) Prosser, Torts 782 (3d ed. 1964).

\(^9\) Cerveny v. Chicago Daily News Co., 139 Ill. 345, 28 N.E. 692 (1891).
a crime of treason or sedition, nor was it stated that plaintiff was a Communist or a Fascist, or an adherent of those philosophies. Such reasoning by the court indicates that the use of a particular label, such as Communist, or Nazi, would be a requirement to sustain a cause of action for libel without the necessity of showing special damages. It is fairly obvious that an important factor to consider in connection with these types of cases would be the role of the subversive group in the current political scene.

Libel per quod language in Illinois is that which is defamatory only as the result of the existence of outside circumstances or extrinsic facts, which "were necessary to prove the imputation conveyed." In the libel per quod situation, the plaintiff is required to allege and prove special damages, unless the language used comes within one of the following categories: imputation of crime, imputation of certain diseases, imputation tending to prejudice a person in his business, trade, profession or office, and imputation of unchastity to a woman.

One Illinois case has apparently departed from the foregoing distinction between libel per se and libel per quod. The Whitby case, after noting that the rules applicable to slander are applicable to libel as well, contains the following statement:

... a written publication of false words in order to be libelous per se must ... by their plain, unambiguous and ordinary meaning, and without resort to innuendo or construction, be injurious on their face and impute some matter falling within the first four categories of offensive material. ... Any other kind of libel is regarded as one per quod, and, like slander, in every instance requires allegations and proof of special damages.

Thus, this case says that words may be injurious on their face and result in seriously affecting the character of an individual, but if the words do not fall within one of the categories of offensive material, this would be a libel per quod situation and proof of special pecuniary damage is necessary to sustain a recovery. Whether or not this pronouncement on the meaning


11 Cf. Prosser, Torts 761 (3d ed. 1964). With respect to defamatory labels, Prosser says: "The line is drawn, however, when the group who will be unfavorably impressed becomes so small as to be negligible, or one whose standards are so clearly anti-social that the court may not properly consider them. The state of mind of the particular community must of course be taken into account, as well as its fluctuations over a period of time. . . ."

12 Prosser, Torts 782 (3d ed. 1964). Footnote 31 on page 782 in Mr. Prosser's treatise refers to what he calls "the classic case of libel per quod," citing Morrison v. Ritchie & Co., 4 Fraser, Sess. Cas., 645, 39 Scot. L. Rep. 432 (1902), "where defendant's newspaper published a report that the plaintiff had given birth to twins. There were readers who knew that she had been married only one month."


15 Ibid.
of libel per se of the *Whitby* case can be relied upon as the law in Illinois is open to question, since the opinion is from the third appellate district. More specifically, the absence of any reference to the old criminal code definition of libel, which has been used in civil cases, leads one to ponder whether or not the old meaning of libel per se is abolished in the third appellate district, and what influence the *Whitby* rule of libel per se will have on civil libel actions in the entire judicial system of Illinois. The court deciding the *Whitby* case, in attempting to clarify the libel per se-libel per quod distinction in Illinois, did more than what most Illinois courts have done with this subject. It is unfortunate that the Illinois court opinions fail to treat this cloudy area of tort law with greater depth, clarity and understanding.

**The Categories**

As we have seen above, libel is not actionable unless special damages are alleged and proved, with the exception that words are actionable if they are defamatory or injurious on their face and, following the *Whitby* rule of libel per se, come within one of the categories of offensive material. The traditional or common law categories are: 1) imputation of crime, 2) imputation of certain diseases, and 3) imputation tending to prejudice a person in his business, trade, or profession or office. A fourth category, imputation of unchastity to a woman, was added later by some jurisdictions. Illinois adopted these categories years ago, and recent decisions still follow this basic outline, although new categories or extensions of the traditional categories have developed as a result of changes in society. A determination of what form words must take to satisfy these categories, thereby relieving a plaintiff from alleging and proving special damages, is the task before the court in many libel cases.

**Imputation of Crime**

The class of words imputing the commission of a crime is probably the category arising most often in the Illinois courts. In determining

---

16 Prosser, *Torts* 772 (3d ed. 1964). While noting that the origin of the categories is in doubt, Mr. Prosser says that they probably developed because of the common recognition that such words might cause pecuniary loss.


18 See generally, 33 I.L.P., *Slander And Libel* §§ 21-27 (1958). See also Ill. Rev. Stat. ch. 126 § 1 (1965): "That if any person shall falsely use, utter or publish words, which in their common acceptance, shall amount to charge any person with having been guilty of fornication or adultery, such words so spoken shall be deemed actionable, and he shall be deemed guilty of slander"; Ill. Rev. Stat. ch. 126 § 2 (1965): "It shall be deemed slander, and shall be actionable, to charge any person with swearing falsely, or with having sworn falsely, or for using, uttering or publishing words of, to or concerning any person, which, in their common acceptance, amount to such charge, whether the words be spoken in conversation of, and concerning a judicial proceeding or not." It would seem reasonable to include language violating the above statutes within the class of libel actionable without proof of special damages. However, in Jacksonville Journal Co. v. Beymer, 42 Ill. App. 443, 447 (3d Dist. 1891), the Appellate Court said, with reference to § 1 above: "We regard this provision of the statute as applicable to verbal slander only."
whether or not certain words are libelous per se, the character or seriousness of the crime imputed to a person is a major factor considered. Other factors considered are the exactness of the charge (whether or not a particular crime is clearly spelled out or only intimated), the punishment for the crime, the image of the plaintiff portrayed to the public as a result of the charge, and the person allegedly libelled.

Recent cases where a criminal offense was clearly imputed resulted in a finding that the words were actionable without proof of special damages. One of these cases involved a defendant who gave another person certain police records containing information indicating that a person having the same name as plaintiff was arrested for gambling. The plaintiff, who had been conducting a political campaign when the defendant circulated these records, was successful in obtaining a reversal in his favor in the Appellate Court. In the case of Flannery v. Allyn, the imputation contained in a letter written by the defendant to the chief of police that plaintiff police officers solicited a bribe, was held to be actionable without proof of special damages. Similarly, in Lorillard v. Field Enterprises, Inc., an article by a society columnist in defendant's newspaper contained a statement that plaintiff's former wife had "started a suit for bigamy." The plaintiff alleged that this statement was actionable without proof of special damages because it charged that the plaintiff had committed the crime of bigamy, when in fact no type of judicial proceeding was initiated by the plaintiff's former wife. The Appellate Court agreed with the plaintiff, deciding that, upon a reading of the article, readers of common and reasonable understanding would conclude that plaintiff had been charged with the crime of bigamy.

On the other hand, libel cases involving language that does not clearly impute a crime to the plaintiff do not generally fall within the class of libel actionable without proof of special damages. In Zurawski v. Dziennik Zjednoczenia Pub. Corp., plaintiff was labelled as a "thief" by the defendant. While calling a person a thief may result in impairing one's reputation, the court said that the word "thief" does not mean that the crime of larceny was committed by the plaintiff, and that this idea was not conveyed to readers of the alleged libelous communication. Similarly, in Torrance v.

---

22 Ibid.
24 Id. at 109, 2 N.E.2d at 958. Cf. Merrill v. Marshall, 113 Ill. App. 447, 450 (1st Dist. 1904), where the court said: "The word thief, in its ordinary acceptation, imputes the crime of larceny and is actionable per se; but if the word be spoken of defendant in relation to a past act or transaction, which was known to the hearers, and which past act or transaction was not larceny, nor indictable as a crime, the use of the word is not actionable." It is difficult to reconcile these conflicting views of the word "thief" when one considers the oft repeated statement that the written word has greater potentialities for harm than the spoken word. Prosser, Torts 769 (3d ed. 1964).
**LIBEL AND SLANDER IN ILLINOIS**

*City National Bank of Rockford,*\(^\text{25}\) a bank’s refusal to honor a check bearing the name of the plaintiff, and the return of the check to a third party marked “insufficient funds” was held not to have charged the plaintiff with the criminal act. However, words in a newspaper article stating that plaintiff, a former public official, had issued a city liquor license after $7,000 changed hands were held to be actionable without proof of special damages, as they charged plaintiff with accepting a bribe.\(^\text{26}\)

It is generally accepted that the form of words charging commission of a crime is not judged by the same technical requirements necessary for an indictment; thus, words fairly imputing a crime could be held actionable in themselves.\(^\text{27}\)

Mr. Prosser suggests that the ultimate test used in determining whether or not words are libelous per se when imputing the commission of a crime is whether the words convey the idea of a major social disgrace.\(^\text{28}\) The decisions in the above cited Illinois cases could have been reached solely on the basis of such a consideration.

**IMPUTATION OF LOATHSOME DISEASE**

The original basis for the category of words, libelous per se, imputing a loathsome disease was the exclusion from society which would result. The significant advances in the field of medicine and a greater understanding of various diseases on the part of the public have accounted for the disappearance of cases under this category, which was originally limited to imputation of venereal disease and other contagious and offensive diseases.\(^\text{29}\) However, the imputation of insanity or impairment of mental faculties by a statement that a person was recovering from a mental illness, although not within this category, was held to be actionable without proof of special damages in a 1959 decision.\(^\text{30}\) The court reasoned that such a statement carried the imputation that plaintiff was of an unsound mind and caused plaintiff to be shunned or avoided by his neighbors and friends. The important factor to consider was not the degree of the illness, but the “injurious effect created in the minds of the reader by the printed words.”\(^\text{31}\)

\(^{25}\) 52 Ill. App. 2d 288, 177 N.E.2d 646 (2d Dist. 1961).
\(^{26}\) Lundstrom v. Winnebago Newspapers, Inc., 42 Ill. App. 2d 306, 192 N.E.2d 307 (2d Dist. 1963). The outcome of this case was finally reached in *Lundstrom v. Winnebago Newspapers, Inc.*, 58 Ill. App. 2d 38, 206 N.E.2d 525 (2d Dist. 1965), where the Appellate Court cites *New York Times Company v. Sullivan*, 376 U.S. 254, 84 Sup. Ct. 710 (1964), and says that the complaint did not state a good cause of action because it did not allege actual malice and consequent special damages. This requirement in cases involving public officials was established by the *New York Times* case.
\(^{28}\) Prosser, Torts 774 (3d ed. 1964).
\(^{29}\) Prosser, Torts 775 (3d ed. 1964).
\(^{31}\) Id. at 503, 156 N.E.2d at 763. Mr. Prosser says that accusations of insanity are not included in the loathsome disease category, although the result of such accusation, the exclusion from society, is the same as a charge of loathsome disease. Prosser, Torts 775 (3d ed. 1964).
Words prejudicing a person in his business, trade, profession or office have been the subject of numerous libel cases in Illinois. The decisions indicate that the alleged defamatory statement, to be actionable without proof of special damages, must show that the plaintiff's conduct is incompatible with the proper conduct of the business. For example, in one case, a news article implicating an ordained minister in a state investigation involving matters of a scandalous nature was held actionable without proof of special damages because the conduct ascribed to the minister was incompatible with the qualifications a minister should possess. Similarly, conduct incompatible with the practice of law by a state's attorney, who was labelled as an unfair and partial prosecutor, and as guilty of malfeasance in office and of such conduct unbecoming a member of the legal profession, was sufficient to warrant a finding that the published language was actionable without proof of special damages. On the other hand, an article written by a Chicago newswriter stating that a woman did a strip-tease on one occasion at plaintiff's business establishment was not actionable without proof of special damages as to the plaintiffs as individuals, and the court stated further, that even if the article was considered in connection with plaintiff's business, there was not any charge that defendants were unfit to operate their business, nor that they were selling adulterated drinks or defrauding the public. In short, the article did not charge plaintiffs with conduct incompatible with the business in which they were engaged.

Since the purpose of this category is to protect persons in their chosen field, the allegedly libelous language must reasonably tend to harm or disgrace the plaintiff in his profession in the minds of the public. Thus, in one case, a female professional entertainer brought an action for libel when a letter written to the editor of defendant newspaper described plaintiff as a young girl, half naked and twirling a hula hoop while riding in the back of a convertible. Actually, the plaintiff was riding in a parade as part of a campaign to advertise a charity dance. On the issue of whether or not the words written of plaintiff with respect to her calling were actionable without proof of special damages, the Appellate Court said:

This publication did not expose or tend to expose plaintiff to contempt, ridicule, or disgrace, and did not induce in the minds of right thinking persons an evil opinion of the plaintiff, or accuse her of indecent exposure, lewdness, public drunkenness, or injure her in her profession as charged. In order to make words . . . writ-
The word "liar" was involved in a recent Illinois decision. The plaintiff in this case was a candidate for public office. An editorial in defendant's newspaper accused plaintiff of being untruthful in a particular instance. While recognizing that the word "liar" is not particularly complimentary, the court said that it does not follow that the use of the word is actionable without proof of special damages. Taking many factors into consideration, especially the fact that plaintiff's candidacy for public office subjected plaintiff and his qualifications to public comment, and that the comment was not made maliciously, the court held that the word "liar" was not actionable without proof of special damages.

When the plaintiff in a libel case is a corporation and a derogatory statement is written in relation to the business, one Illinois decision says that for such a statement to be actionable without proof of special damages the corporation's financial position and business methods must be assailed, or the corporation must be accused of fraud or mismanagement.

**LIBEL PER QUOD**

Many statements allegedly actionable without proof of special damages contain language that does not properly fall within one of the categories of offensive material discussed above or the ordinary meaning of the words used is not injurious on its face. These words are considered libel per quod, and the plaintiff is required to allege and prove special damages. Representative of such language is the statement in a 1955 case about plaintiff, a candidate for public office, being seen by an investigator while receiving money from the local dog catcher. While the language in the statement could prejudice the plaintiff in his profession, the ordinary meaning of the words used was not actionable without proof of special damages or

---

85 Archibald v. Belleville News Democrat, 54 Ill. App. 2d 38, 40, 203 N.E.2d 281, 283 (5th Dist. 1964). Cf. Jamison v. Rebenson, 21 Ill. App. 2d 364, 158 N.E.2d 82 (1st Dist. 1959): written statement by defendants, officers and employees of local union, accusing plaintiff union organizer of making improper advances to females were held to be capable of a defamatory meaning, since the words could reasonably detract from plaintiff's reputation of good moral character and injure him in his employment.


87 Id. at 108, 205 N.E.2d at 48.


89 Eldredge, *The Spurious Rule of Libel Per Quod*, 79 Harv. L. Rev. 733, 736 (1966), wherein the writer states: "... the rule of libel per quod was spawned by confusion over such terms as 'actionable per se,' 'libel per se,' 'slander per se,' 'per quod,' and 'innuendo,' ..." in courts that had no clear understanding of the law of defamation, its historical background, and the frequently silly distinctions drawn between slander and libel. The Latin expression 'per quod,' meaning 'whereby,' traditionally introduced the specification of damages incurred."

injurious on their face. Words referring to the plaintiff as a “Negro” and a “Chink” were not actionable without proof of special damages in another case.41

GROUP LIBEL

The problems presented when allegedly libelous statements are directed at a group of persons were highlighted in Latimer v. Chicago Daily News.42 The plaintiffs in this case were nine attorneys out of a group of twenty-three attorneys representing certain defendants indicted for conspiracy. The language of the news item published by defendant43 did not identify any particular plaintiff or plaintiffs, but was only a derogatory statement written about a group. Without being able to say with certainty that the plaintiffs were meant to be in the group of attorneys libelled, the court said that a cause of action for libel did not accrue to individuals included in the group.44

JACK F. KUHLMAN

SLANDER AND LIBEL DISTINGUISHED

Slander has been defined as “oral defamation; the speaking of false and malicious words concerning another, whereby injury results to his reputation.”1 The definition of libel has been stated to be “a method of defamation expressed by print, writing, pictures or signs.”2 The distinction between slander and libel has been stated to be that “Libel and slander are both methods of defamation; the former being expressed in print, writing, pictures or signs; the latter by oral expressions.”3

The aforementioned distinction appears to be fundamentally simple and uncomplicated. However, the differentiation between slander and libel has often become a perplexing judicial dilemma. Before analyzing the need for such distinction, it would be helpful to probe into the factors upon which the distinction has developed. It should be initially stated that the respective unilateral development of the torts of libel and slander is to the greatest extent an anomalous, religious, historical, and political accident. Only through an examination of the treatment given to defamation actions

43 “... [T]he scum of political gangsterdom in this country are represented by as craven a group of lawyers as I’ve seen, not excluding the nickel and dime shysters who used to hang around the racket court on So. State St. as staff attorneys for the gambling and vice syndicate.” Id. at 297, 71 N.E.2d at 554.
44 Id. at 298, 71 N.E.2d at 555. See Annot., 70 A.L.R.2d 1582 (1960) for discussion of the right of an individual member of a group to maintain an action for libel.

2 Id. at 1060.
3 Id. at 1559.