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Special Damages

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tiff, the town constable, had arrested Ayers in the public square for breach of a town ordinance and had taken a knife away from him. Later plaintiff was accused by Ayers of stealing the knife and some money. The charge of stealing was understood by the hearers to relate to the arrest. The lower court refused defendant’s request for an instruction to the effect that if the words were proven to have been spoken by defendant about and in relation to a known act, and that act in law was not a felony, which was known by the bystanders, the defendant should be found not guilty. Said the court:

Actionable words impute malice, and that is the gist of the action; it is a question of intention, therefore, sufficiently evidenced by the use of actionable words, unaccompanied by explanatory words or circumstances. These, however, may show the intention to have been innocent; the presumption of malice is wanting and no foundation for the action exists. . . .

Under these circumstances no larceny could be committed, as such a taking could at most only amount to a trespass, and therefore, being spoken in reference to such a transaction, and so understood by the hearers, they were not actionable, and the court should have granted a new trial. 6

Passion will not rebut malice implied. In Hosley v. Brooks, 7 at the time of the alleged defamatory utterance, defendant was angry and in a fit of passion. Said the court in upholding a decision for the plaintiff: “Our law implies malice from the speaking of the words, and the heat of the aggressor’s passions has no tendency to rebut the malice thus implied.” 8

RONALD HANKIN

SPECIAL DAMAGES

In actions for libel and slander, it is essential for the plaintiff to allege and prove special damages resulting from the defamatory statement before he will be entitled to recover, unless the words are actionable per se. “One who falsely and without a privilege to do so publishes a slander which, although not actionable per se, is the legal cause of special harm to the person defamed, is liable to him.” 1

“Special damages” means that there must be specific proof of a

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6 Ayers v. Grider, 15 Ill. 37, 38 (1853).
7 20 Ill. 116 (1858); see also Flagg v. Roberts, 67 Ill. 485, 487 (1873): “. . . as the law implied malice from the speaking of actionable words, the passion of the slanderer could have no tendency to rebut the malice thus implied.”
8 Hosley v. Brooks, supra note 7, at 119.
1 Restatement, Torts § 575 (1938).
pecuniary loss, as distinct from general damage to reputation assumed to follow. Of this requirement, McCormick has said:

What injury will satisfy this requirement of "special damage?" Here again the mark of history is apparent in the requirement that the injury must be a pecuniary or material one. This was evolved as a basis for classifying in a group of slander cases which the law courts would withdraw to themselves from the ecclesiastical tribunals, whose jurisdiction was "spiritual." The requirement is often rigorously applied today, though occasionally relaxed, and affords another hurdle with which the judge can confront the dubious claim. Thus it is not usually enough for the plaintiff to plead that the publication of the slander has humiliated or embarrassed him, or has been productive of mental anguish, or even that actual sickness has been brought on.

The Restatement also adopts the view that special damages must be pecuniary in nature. Slanderous words, no matter how grossly defamatory or insulting they may be, which cannot be fitted into the arbitrary categories of defamation per se, are actionable only upon proper averment of special damages. Thus, in Campbell v. Morris, defendant circulated an "official warning circular" to other members of the Mason organization, stating that plaintiff, who was a physician, bank president and candidate for state senator, "poses as a Mason in good standing." The court found that the statement was not libelous per se, and, since the plaintiff had not averred special damages, the granting of defendant's demurrer was sustained. The same result was reached in Mitchell v. Tribune Co., where two articles labelled plaintiff as a "chink," and Ward v. Forest Preserve Dist. of Winnebago, where defendant

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3 McCormick, Damages § 114, at 419 (1935).
4 Restatement, Torts § 575, Comment b (1938):
Special harm. Special harm as the words are used in this Chapter is harm of a material and generally of a pecuniary nature. . . . Loss of reputation to the person defamed is not sufficient to make the defamer liable under the rule stated in this Section unless it is reflected in material harm. So too, lowered social standing and its purely social consequences are not sufficient. . . . If, however, the loss of reputation results in material loss capable of being measured in money with approximate exactness, the fact that the lowered social standing resulting from the slander itself causes the acts which produce such loss does not prevent the tangible loss from being special harm. Thus, while a slander which has been so widely disseminated as to cause persons previously friendly to the plaintiff to refuse social intercourse with him is not of itself special harm, the loss of the material advantages of their hospitality is sufficient. Special harm may be a loss of presently existing advantages, as a discharge from employment. It may also be a failure to realize a reasonable expectation of gain, as the denial of employment which, but for the currency of the slander, the plaintiff would have received. It is not necessary that he be legally entitled to receive the benefits which are denied to him because of the slander. It is enough that the slander has disappointed his reasonable expectation of receiving a gratuity.
5 224 Ill. App. 569 (4th Dist. 1922).
orally called plaintiff, a forest district employee, a "communist." In each of these cases, the defendant's remark was found not to be actionable per se, and, since no special damages were alleged, the action was dismissed.

The requirement of pleading and proving special damages is not satisfied by general allegations or evidence of damage. For example, in Wright v. F. W. Woolworth Co.,\(^8\) the plaintiff, a white woman, was refused service in the defendant's store and called a "nigger" by the defendant's servants. The words were held not slanderous per se. As to special damages, the plaintiff charged that the statement tended to "exclude her from society, and by reason of said false and defamatory publication the plaintiff has been injured in her reputation as well as in her business, and has sustained mental suffering to her damage . . . ." These allegations were found to be descriptive only of general and not special damages.\(^9\)

Allegations that the plaintiff was shunned and avoided by others are not enough unless pecuniary harm results. Thus, in Clavin v. Froelich,\(^10\) the defendant had said of plaintiff, a cashier in a bank, "Clavin is an Irish bullhead and was run out of Marine (Village) . . . . You had better put him out of the bank or you will lose business." The complaint alleged that the plaintiff had been greatly injured and damaged in his good name, credit, reputation and business, that divers people at the bank had refused to have dealings with him as cashier, that he was greatly damaged and injured and hindered in his dealings as cashier and deprived of compensation and profit that otherwise would be due to him. The court, without discussion, held that the complaint lacked an allegation of special damages and that a demurrer was properly sustained.

The actual loss of customers or business as a result of the defamatory remark is a prime example of special damages.\(^11\) However, it may be very difficult for the plaintiff to show that he has lost specific customers as a proximate result of the defamatory statement, even though he may be able to show that his business in general has fallen off. Therefore, the majority of courts have held that a general allegation of loss of business, with proof of a general decline, and the negation of other possible causes, will be

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\(^8\) 281 Ill. App. 495 (4th Dist. 1935).
\(^10\) 162 Ill. App. 50 (3d Dist. 1911).
\(^11\) Prosser, Torts 779 (3d ed. 1964). A distinction must be made between actual harm to the plaintiff in his trade, occupation or business as special damages, and words calculated to harm the plaintiff in his trade, occupation or business as slander per se. In the latter case, the words are actionable whether any harm actually results to the plaintiff or not; in the former, the words are actionable if they result in actual harm, even if they were not spoken of the plaintiff in his business capacity. For example, a statement that a surgeon is a "butcher" would be uttered of him in his professional capacity and would be actionable even if no one believed the accusation and his business did not fall off. The statement would be slander per se. However, a statement that the surgeon was a "lecher" would not be slander per se, though defamatory, and would require a showing that the plaintiff actually lost customers as a result of the statement. If he did, recovery would be had even though the words were not uttered of him in his business capacity.
LIBEL AND SLANDER IN ILLINOIS

sufficient where it is impossible to be more specific. Thus, in *Trenton Mut. Life and Fire Ins. Co. v. Perrine*, the New Jersey Supreme Court of Judicature said:

> The objection relied upon is that the declaration should have stated by name what persons have refused to insure their lives and property in the company by reason of the libel, and from whom they would otherwise have received greater gains.

The general rule certainly is, that where the plaintiff alleges, by way of special damage, the loss of customers in the way of his trade, or the refusal of friends and acquaintances to associate with him, or the loss of marriage, or the loss of service, the names of such customers or friends, or the name of the person with whom marriage would have been contracted, or services performed, must be stated.

But the rule is relaxed when the individuals may be supposed to be unknown to the plaintiff, or where it is impossible to specify them, or where they are so numerous as to excuse a specific description on the score of inconvenience.

However, one Illinois court has apparently declined to relax the plaintiff's burden and has required that particular contracts and sales lost must be pleaded as a necessary step to recovery. In *Life Printing & Publ. Co. v. Marshall Field*, plaintiff charged that the defendant newspaper had printed articles intimating that he was a member of an anti-semetic group. In affirming the lower court's judgment for the defendant, the court said:

> Plaintiff cannot recover on its theory of special damages, which as shown above are based on general allegations that many advertisers and other persons, and especially persons of Jewish descent, have, because of the publications complained of, declined and refused to have any business transactions with plaintiff, and loss has resulted to plaintiff. This is not a sufficient allegation of special damages. Such damages must be alleged with particularity.

There is a paucity of other decisions in Illinois dealing with the proper

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13 23 N.J.L. 402, 414 (1852).


15 Id. at 263, 58 N.E.2d at 311. Accord, Wilson v. Dubois, 35 Minn. 471, 29 N.W. 68, 69 (1886):

> It is indispensable to allege and show a loss of sale to some particular person, for the loss of a sale to some particular person is the special damage, and of the gist and substance of the action. ... If there is no such person, there is no cause of action; and it follows that the failure to name the particular person or persons to whom a sale could have been effected, if it had not been prevented by the disparagement, does not present a case of mere indefiniteness, but of total absence of an allegation essential to the statement of a cause of action. ... See also Hambric v. Field Enterprises, 46 Ill. App. 2d 355 (1st Dist. 1964) (losses must be alleged with particularity). But cf. Randall Dairy Co. v. Beverly Dairy Co., 291 Ill. App. 380, 391 (4th Dist. 1937) (testimony that there was a general loss of customers; "this cannot be regarded as a coincidence").
averment of special damages. In *Hudson v. Slack Furniture Co.*,\(^\text{16}\) the defendant sent a wage assignment to the plaintiff’s employer, a railroad which had a policy of firing employees after such assignments. The plaintiff alleged as special damages some incidental bills incurred in getting a release of the assignment, but proved no other pecuniary loss since only a warning had been issued by his employer. The court felt that some special damage had been shown and that recovery could be allowed, but held that an award of five hundred dollars was excessive. In *Bradley v. Bakke*,\(^\text{17}\) the court indicated in dictum that an allegation that a maid accused of stealing newspapers had been discharged without references was a proper averment of special damages. On the other hand, in *Wright v. F. W. Woolworth Co.*,\(^\text{18}\) an allegation of mental suffering was held insufficient as an element of special damage.

In *Hambric v. Field Enterprises*,\(^\text{19}\) the complaint alleged that a newspaper article alleged that the plaintiff ran a saloon at which a strip tease had been performed. The plaintiff charged that the article damaged his good name, reputation and business, exposed him to public hatred and obloquy, attracted to his place of business persons of bad character whose presence tended to drive away respectable clientele, and exposed him to constant investigation and harassment by the police. In a second count, plaintiff’s wife alleged the same general harm to her reputation, and added the charge that she had been subjected to derision, insults and indecent proposals, which caused her to become ill. All of these were held to be descriptive of general damages only, and the action failed.

**Parasitic And Punitive Damages**

Once a cause of action has been established, either from the character of the defamation itself or by the proof of special pecuniary loss; all damages, whether special or not, may be recovered, as, for example, mental suffering,\(^\text{20}\) and loss of sleep.\(^\text{21}\) In addition, of course, when malice is shown, exemplary damages may be awarded.\(^\text{22}\)

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\(^{16}\) 318 Ill. App. 15, 47 N.E.2d 502 (4th Dist. 1943).
\(^{17}\) 306 Ill. App. 569 (1st Dist. 1940).
\(^{18}\) 281 Ill. App. 495 (4th Dist. 1935).
\(^{19}\) 46 Ill. App. 2d 355 (1st Dist. 1964).