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Torts—Libel—False Announcement of Betrothal Is Actionable Per Se Where the Parties Are Already Married to Others

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public policy at least equal to that of a public official, that the present event was of public interest, and that the plaintiff had thrust himself into public discussion of the issue. If any of these elements were not shown to be present, the societal and individual interests in protection of reputation would outweigh the interests in public debate and plaintiff would be allowed to recover.

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TORTS—LIBEL—FALSE ANNOUNCEMENT OF BETROTHAL IS ACTIONABLE PER SE WHERE THE PARTIES ARE ALREADY MARRIED TO OTHERS

Defendant's newspaper published an announcement that plaintiffs Hinsdale and Reiber had become engaged to be married. In fact, they were already married to others, worked in the same office, and lived with their respective spouses and children in the same small community in which defendant's newspaper was published. Hinsdale and Reiber (joined by her husband) commenced actions in libel against defendant. No special damages[1] were alleged in either complaint. The Supreme Court in Special Term dismissed both complaints, holding that an allegation of special damage is necessary where the publication is defamatory only in view of extrinsic facts. The Appellate Division affirmed without opinion.[2] The Court of Appeals reversed. *Held*, where a publication falsely announces the betrothal of persons in fact already married to others, that publication is actionable without a showing of special damage albeit the facts making it defamatory (*i.e.*, that the parties are already married to others) do not appear therein. *Hinsdale v. Orange County Publications, Inc.*, 17 N.Y.2d 284, 217 N.E.2d 650, 270 N.Y.S.2d 592 (1966).

Libel has been described as writing that tends to hold plaintiff up to "ridicule, contempt, shame, disgrace or obloquy, to degrade him in the estimation of the community . . . to diminish his respectability. . . ."[3] Where such a tendency is apparent on the face of a writing, most courts agree that it is actionable per se (*i.e.*, without showing special damages).[4] If the publication becomes defamatory only in light of extrinsic facts (*i.e.*, facts not appearing in the publication itself), it is generally accepted that such *facts* must be specifically alleged,[5]

1. The term "special damage" refers to specific material or pecuniary damage that is a natural but not necessary result of the wrong. Thus, injury to reputation, humiliation, mental anguish, and physical sickness, are not sufficient. Special damages must be pleaded with particularity. See McCormick, Damages §§ 8, 114, 115 (1935).

2. 24 A.D.2d 704, 261 N.Y.S.2d 1005 (2d Dep't 1965).

3. 1 Seelman, Libel and Slander in New York ¶ 18, at 16 (rev. ed. 1964), cited with approval in Hinsdale v. Orange County Publ., Inc., 17 N.Y.2d at 287, 217 N.E.2d at 652, 270 N.Y.S.2d at 595 (1966) [hereinafter cited instant case].

4. The courts thus make a presumption that damage to reputation will inevitably result from the publication. See *e.g.*, Boyd v. Boyd, 116 Va. 326, 82 S.E. 110 (1914). See also Prosser, Torts § 107, at 780 (3d ed. 1964); 1 Seelman, *op. cit supra* note 3, ¶ 331, at 439 n.5 (compilation of New York cases so holding).

5. See Van Heusen v. Argenteau, 194 N.Y. 309, 87 N.E. 437 (1909); Lasky v. Kemp-

though courts disagree as to whether in such cases special damages must also be alleged and proved.[6]

This conflict has occurred among the New York courts, and has resulted in two lines of authority. The first line, represented by the Court of Appeals' decision in the case of *O'Connell v. Press Publishing Co.*,[7] requires allegations and proof of special damage to support an action of libel by extrinsic fact. That case involved a newspaper report of federal grand jury investigations and criminal prosecutions for alleged fraud in weighing sugar imports to avoid payment of import duties. The report indicated that plaintiff testified before the grand jury that he had invented a steel spring device, and had shown it to an official of the company involved in the fraud, who referred him to an employee later indicted. The article also reported certain facts heard by the grand jury, which, as the *O'Connell* Court later noted, could have supported a conclusion that the spring device was used to make the scales weigh falsely. Plaintiff alleged that the report imputed criminal conduct to him, and pleaded the relevant federal criminal fraud statutes. The Court of Appeals, applying what it called an "established rule of law" that a publisher of libel by extrinsic fact is liable only for the specific pecuniary damage (special damage) caused thereby, reasoned that since no such damage was alleged, the action could be maintained only if the publication was libelous "in and of itself." However, in finding the publication not to be so libelous, the Court appears in fact to have taken account of the extrinsic facts in basing its decision upon the unsuccessful attempt by plaintiff to ascribe

ton, 285 App. Div. 1121, 140 N.Y.S.2d 526 (1st Dep't 1955). See also 1 Harper & James, Torts § 5.9, at 373 (1956).

Libel which depends upon extrinsic facts for its defamatory meaning is commonly known as "libel by extrinsic fact," and will be so referred to herein. The classic case of libel by extrinsic fact is considered to be Morrison v. Ritchie & Co., 4 Fraser (4 Sess. Cas.) 645, 39 Scot. L. Rep. 432 (1902) in which the publication announced that plaintiff had given birth to twins when plaintiff's friends knew that she had been married only one month. Prosser, *op. cit. supra* note 4, § 107, at 782 n.31.

6. *Compare* Ilitzky v. Goodman, 57 Ariz. 216, 112 P.2d 860 (1941), *with* Herrmann v. Newark Morning Ledger Co., 48 N.J. Super. 420, 138 A.2d 61, *aff'd on rehearing*, 49 N.J. Super. 551, 140 A.2d 529 (App. Div. 1958), *and* Martin v. Outboard Marine Corp., 15 Wis. 2d 452, 113 N.W.2d 135 (1962).

Courts which require special damage often use the term "libel per quod" to refer to libel by extrinsic fact. Per quod was originally the phrase which prefaced allegations of special damage; Black, Law Dictionary 1293-94 (4th ed. 1951).

The position of the majority of American jurisdictions is an issue of considerable debate. See 1 Harper & James, Torts § 5.9, at 373 (1956); Eldredge, *The Spurious Rule of Libel Per Quod*, 79 Harv. L. Rev. 733 (1966) (both concluding the majority view does not require special damages). *But see* Prosser, *Libel Per Quod*, 46 Va. L. Rev. 839 (1960); Prosser, *More Libel Per Quod*, 79 Harv. L. Rev. 1629 (1966).

The Restatement, Torts § 569 (1938) takes the position that *all* libel is actionable per se. However, there is some question at the time of this writing as to whether the Restatement (Second), Torts, yet to be published, will embody the same rule. See Restatement (Second), Torts § 569 (Tent. Draft No. 12, 1966).

Part of the confusion apparent in many of the libel by extrinsic fact cases stems from inconsistent usage of terms. For example, "libel per se" is used by some courts to mean defamatory on its face, and by others to refer to libel that is actionable per se. *Compare* Ilitzky v. Goodman, *with* the instant case. See also, Herrmann v. Newark Morning Ledger Co., *supra*; Martin v. Outboard Marine Corp., *supra*; Berney, *Libel and the First Amendment—A New Constitutional Privilege*, 51 Va. L. Rev. 1, 16 (1965); Eldredge, *supra*, at 737.

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

a defamatory meaning (innuendo) to language which could not reasonably support such a meaning.[8] Thus it would seem that the rule in *O'Connell* requiring special damages was merely dictum,[9] as the Court of Appeals in the instant case held.[10] The rule has also been challenged as being unsupported by precedent, although the *O'Connell* Court purportedly relied upon four Court of Appeals cases.[11] It has been clearly demonstrated by commentators, however, that the Court's reliance was unjustified since the cases cited were not in point.[12]

On the other hand, the second line of authority in New York holds that a libel by extrinsic fact need not be supported by special damages. The leading case therein is *Sydney v. MacFadden Newspaper Publishing Co.*[13] There a newspaper article reported that plaintiff was the "latest lady love" of a certain famous actor, and intimated that the two might be planning marriage. The fact that plaintiff was already married was not referred to in the publication, and no special damages were pleaded. The Court of Appeals purportedly relied on *O'Connell* for the proposition that to maintain the action in the absence of special damages the publication must be "libelous per se," which in fact the Court found it to be. Thus it was clear after *Sydney* that a writing could be "libelous per se" even though its defamatory meaning depended upon extrinsic facts.[14] However, the Court apparently recognized a limitation on the kinds of extrinsic facts which could be alleged when unsupported by special damages:

> It has been suggested that this article says nothing about Doris Keane being married. This is true. Neither does it say 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.*[15]

This kind of limitation, to certain "basic" facts about plaintiff (such as marriage) was reasonable since one may presume that such facts were known to at least some of the readers even though not referred to in the publication. This

8. In its opinion the *O'Connell* Court stated, "The invention of a device which may be used for criminal purposes and the showing of it to a person in whose business it might be so used and the fact that he did use it, do not within reasonable and fair contemplation or understanding, tend to incriminate or disgrace the inventor." *Id.* at 360, 108 N.E. at 558.

9. See Henn, *Libel-By-Extrinsic-Fact*, 47 Cornell L.Q. 14, 35 (1961). It should be noted that the *O'Connell* decision was rendered by a divided court; the minority, however, including Cardozo, J., did not state the grounds for its dissent.

10. Instant case at 290, 217 N.E.2d at 653-54, 270 N.Y.S.2d at 598.

11. McNamara v. Goldan, 194 N.Y. 315, 87 N.E. 440 (1909); Crashley v. Press Publ. Co., 179 N.Y. 27, 71 N.E. 258 (1904); Bassell v. Elmore, 48 N.Y. 561 (1872); Stone v. Cooper, 2 Denio 293 (N.Y. 1845).

12. See 1 Seelman, *op. cit. supra* note 3, § 46, at 73; Henn, *supra* note 9, at 25; Comment, 27 Fordham L. Rev. 405, 406-8 (1958).

13. 242 N.Y. 208, 151 N.E. 209 (1926).

14. That is, the Court used "libel per se" to mean "actionable per se" rather than to mean "on its face," or "in and of itself."

15. Sydney v. MacFadden Newspaper Publ. Co., 242 N.Y. 208, 213, 151 N.E. 209, 210 (1926) (Emphasis supplied.). *Cf.*, Pitts v. Spokane Chronicle Co., 63 Wash. 763, 771, 388 P.2d 976, 981 (1964): "We hold then that words published in a daily newspaper concerning such matters as betrothals, marriages, births, divorces and custody of children, if false, may be shown to be libelous by proof of extrinsic circumstances, and thus become actionable without proof of malice or special damages."

reasoning, involving a presumption of knowledge, was expressly recognized in *Sydney*,[16] as it had been in at least one prior case,[17] and has been applied where the facts relate to the plaintiff's occupational status[18] or to the nature of the subject matter with which plaintiff has been wrongly associated.[19] However, in these cases, the Court of Appeals, stressing specific reasons for admitting into evidence the *particular facts* of each case, has refused to establish a general rule that *all* extrinsic facts will be considered to determine whether a publication is defamatory. At the same time, the Court failed, prior to the instant case, to reconcile the *O'Connell* decision with subsequent holdings. The result has been a lack of consistency among New York courts.[20]

Two distinct holdings can be discerned in the opinion of the Court in the instant case. The first concerns the basic question of what constitutes defamation, and the second deals with the admissibility of extrinsic facts to show that a particular charge was in fact made by the publication. As to the first holding, the Court ruled that a statement which charged that a person already married is about to marry a new partner is defamatory, apart from any charge of sexual immorality, for such "imputes a violation of commonly accepted rules of marital morality, a deviation from community norms."[21] The Court recognized that even publishing that a married couple is about to be divorced is defamatory.[22]

In its second and undoubtedly more important holding, the Court ruled that special damages are not required even though plaintiff alleges extrinsic facts to show that the publication, innocent on its face, was in fact defamatory. In rejecting any interpretation of *O'Connell* to the contrary, the Court said, "If the *O'Connell* case means that a libel per se action cannot stand if extrinsic facts must be read with it or into it, then *O'Connell* is directly opposed to the numerous decisions of our court . . . ."[23] In so discarding the famous dictum of

16. Sydney v. MacFadden Newspaper Publ. Co., 242 N.Y. 208, 214, 151 N.E. 209, 211 (1926).

17. Gates v. New York Recorder Co., 155 N.Y. 228, 49 N.E. 769 (1898).

18. See, *e.g.*, Braun v. Armour & Co., 254 N.Y. 514, 173 N.E. 845 (1930) (plaintiff's market is kosher); Ben-Oliel v. Press Publ. Co., 251 N.Y. 250, 167 N.E. 432 (1929) (plaintiff's eminence in her field); Blake v. Sun Printing & Publ. Ass'n, 229 N.Y. 515, 129 N.E. 897 (1920) (plaintiff is an attorney).

19. See, *e.g.*, Balabanoff v. Hearst Consol. Publ., Inc., 294 N.Y. 351, 62 N.E.2d 599 (1945); Gates v. New York Recorder Co., 155 N.Y. 228, 49 N.E. 769 (1898).

20. *E.g.*, *compare* Smith v. Smith, 236 N.Y. 581, 142 N.E. 292 (1923), *with* Solotaire v. Cowles Magazines, Inc., 107 N.Y.S.2d 798 (Sup. Ct. 1951); both cases involved the extrinsic fact of marriage. Also, *compare* Ben-Oliel v. Press Publ. Co., 251 N.Y. 250, 167 N.E. 432 (1929), *with* Kuhn v. Veloz, 252 App. Div. 515, 299 N.Y. Supp. 924 (1st Dep't 1937), both cases involving occupational status. Note that in all cases above the defamatory statement, if unwritten, would have been slander per se; however, since the lower courts followed the *O'Connell* "rule," they determined that a charge that would be slanderous per se would require special damages if written. Also *compare* the instant case below, *with* Sydney v. MacFadden Newspaper Publ. Co., 242 N.Y. 208, 151 N.E. 209 (1926).

21. Instant case at 287, 217 N.E.2d at 651, 270 N.Y.S.2d at 595. Again, "we conclude, therefore, that printed statements like those in this newspaper announcement about married people are libelous per se. . . ." *Id.* at 288, 217 N.E.2d at 652, 270 N.Y.S.2d at 595.

22. Instant case at 287-88, 217 N.E.2d at 652, 270 N.Y.S.2d at 595.

23. Instant case at 290, 217 N.E.2d at 653, 270 N.Y.S.2d at 597. Note that the Court uses the term "libel per se," as in *Sydney*, to mean libel that is actionable per se; *e.g.*,

O'Connell, the Court left no basis upon which an allegation of special damage can be required solely because extrinsic facts are relied upon. It held further that the extrinsic fact alleged (*i.e.*, marriage) was of such a nature that it could be presumed to be known by plaintiff's acquaintances.[24] As to them, absence of the fact in the publication made little difference, and the injurious tendency of the announcement was not thereby voided. By the same reasoning, an extrinsic fact of a nature that would not warrant a presumption of knowledge should be treated identically if recipient's actual knowledge were proved. Other jurisdictions have taken this position, but the precise question has never been directly decided by the New York Court of Appeals.[25] However, in view of apparent retention of the traditional common law rule,[26] New York now appears to hold that *all* libel is actionable without showing special damage, including that libel which depends upon extrinsic facts for its defamatory meaning if such facts are specifically alleged and known, or presumably known, to the recipients.

Recovery in libel is based primarily upon a presumption that damage will result from a publication that has a tendency to injure plaintiff's reputation.[27] Where such a tendency is apparent on the face of the writing, the presumption follows as a matter of law.[28] Where the tendency, although not apparent on the face of the writing, is proved by extrinsic facts known (or presumably known) by the recipients, it would logically follow that damage should again be presumed since the tendency to injure plaintiff's reputation again exists. This, in fact, is the result reached at common law.[29] It is irrelevant that defendant did not intend to defame plaintiff, or that he was not negligent or had no notice that he was doing so, since liability for defamation is not predicated upon fault.[30] The doctrine of strict liability is not unique to defamation, nor is it inconsistent

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"libelous per se, that is, that, without a showing of 'special' damage, they raise a presumption of inevitable actual damage to reputation . . ." Instant case at 288, 217 N.E.2d at 652, 270 N.Y.S.2d at 595.

24. Although the Court noted that plaintiffs lived in the kind of small community in which "people know each other," it is clear from the rest of the opinion and prior cases that plaintiff's married status will always be deemed presumably known, regardless of the size of his or her hometown. See, *e.g.*, Smith v. Smith, 236 N.Y. 581, 142 N.E. 292 (1923); Morey v. Morning Journal Ass'n, 123 N.Y. 207, 25 N.E. 161 (1890).

25. See, *e.g.*, Herrmann v. Newark Morning Ledger Co., 48 N.J. Super. 420, 444, 138 A.2d 61, 74, *aff'd on rehearing*, 49 N.9. Super. 551, 140 A.2d 529 (App. Div. 1958): "[T]he harmful impact of a libel upon its victim is not less in the particular instance where its odious meaning requires resort to extrinsic facts which are known to the recipient of the libel." See also Restatement, Torts § 563, comment e at 149 (1938) (cited in the instant case at 288, 217 N.E.2d at 652, 270 N.Y.S.2d at 596). The majority of extrinsic fact cases, however, do involve facts which warrant such a presumption.

26. See Hinkle v. Alexander, 417 P.2d 586 (Ore. 1966); Prosser, Torts § 107, at 780-82 (3d ed. 1964); Restatement, Torts § 569, comment b (1938).

27. It has been said that, "The primary basis of an action for libel or defamation is contained in the damage that results from the destruction of or harm to that most personal and prized acquisition, one's reputation." Gruschus v. Curtis Publ. Co., 342 F.2d 775, 776 (10th Cir. 1965). See also Kennedy v. Item Co., 213 La. 347, 34 So. 2d 886 (1948).

28. *Supra* note 4.

29. See Cassidy v. Daily Mirror Newspapers, Ltd., [1929] 2 K.B. 331, 341-42 (Ct. App.).

30. Restatement, Torts § 580 (1938). See also Prosser, Torts § 108, at 790 (3d ed. 1964); Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 63, 126 N.E. 260, 262 (1920).

with modern tort law.[31] The application of strict liability in libel has been held reasonable in its effect on newspapers.[32] Often, a simple check into the newspaper's own files or a city directory, or a call to plaintiff's home can prevent the libel.[33] Justification for strict liability is often phrased in concepts of social justice or realistic economics:[34] *e.g.*, enterprise liability, capacity to bear the loss, and ability to spread the risk.[35] Moreover, low cost insurance is available to newspapers for this risk.[36] These concepts are readily applicable to newspaper libel,[37] and fully support the result in the instant case.

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31. See, *e.g.*, Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rep. 697 (1962); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965). For example, strict liability is applied to workman's compensation; Bohlen, *A Problem in The Drafting of Workman's Compensation Acts*, 25 Harv. L. Rev. 517 (1912); harmful food cases; Freezer, *Social Justice in the Field of Torts*, 11 Minn. L. Rev. 313, 323 (1926); and generally to cases involving ultrahazardous activities, dangerous animals, etc. See generally Prosser, Torts ch. 14 (3d ed. 1964); Carpenter, *The Doctrine of Green v. General Petroleum Corp.*, 5 So. Cal. L. Rev. 263, 265-66 (1932) (16 examples of applications of strict liability). See also Laufer, *Tort Law in Transition: Charles S. Desmond's Quarter Century on the New York Court of Appeals*, 15 Buffalo L. Rev. 276, 280 (1965); "[T]he negligence concept appears to be yielding its central place in the tort universe as we are entering an era in which the notion of strict liability will serve as a complement if not counterpoise to the fault principle." As to current proposals that a type of strict liability be extended to the field of automobile accidents, see Bergan, *A Thesis on Motor Vehicle Liability Without Fault*, 28 Albany L. Rev. 199 (1964); Cohen, *Fault and the Automobile Accident: The Lost Issue in California*, 12 U.C.L.A.L. Rev. 164 (1964); James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 Yale L.J. 549 (1948); James, *An Evolution of the Fault Concept*, 32 Tenn. L. Rev. 394 (1965).

32. Such holding is evidenced by the following statement:

> It is said that this decision would seriously interfere with the reasonable conduct of newspapers. I do not agree. If publishers of newspapers, who have no more rights than private persons, publish statements which may be defamatory of other people, without inquiry as to their truth, in order to make their paper attractive, they must take the consequences, if on subsequent inquiry, their statements are found to be untrue or capable of defamatory and unjustifiable inferences. . . . To publish statements first and inquire into their truth afterwards, may seem attractive and up to date. Only to publish after inquiry may be slow, but at any rate it would lead to accuracy and reliability.

Cassidy v. Daily Mirror Newspapers, Ltd., [1929] 2 K.B. 331, 341-42 (Ct. App.).

33. These facts have led one writer to say that "inadvertent newspaper libel seldom, if ever, occurs without negligence." Morris, *Inadvertent Newspaper Libel and Retraction*, 32 Ill. L. Rev. 36 (1937).

34. See generally, *e.g.*, Ehrenzweig, Negligence Without Fault (1951); Freezer, *Social Justice in the Field of Torts*, 11 Minn. L. Rev. 313 (1926); Friedmann, *Social Insurance and the Principles of Tort Liability*, 63 Harv. L. Rev. 241 (1949); Gregory, *Trespass to Negligence to Absolute Liability*, 37 Va. L. Rev. 359 (1951); James, *Some Reflections on the Bases of Strict Liability*, 18 La. L. Rev. 293 (1958); Keeton, *Conditional Fault in the Law of Torts*, 72 Harv. L. Rev. 401 (1959); Leflar, *Negligence in Name Only*, 27 N.Y.U.L. Rev. 564 (1952); Ognall, *Some Facets of Strict Tortious Liability in the United States and Their Implications*, 33 Notre Dame Law. 239 (1958); Smith, *Tort and Absolute Liability—Suggested Changes in Classification*, 30 Harv. L. Rev. 241, 319, 409 (1917).

35. See cases *supra* note 34. See also Prosser, Torts ch. 14 (3d ed. 1964); Donnelly, *Defamation by Radio: A Reconsideration*, 34 Iowa L. Rev. 12, 21-23 (1948); Freezer, *Capacity To Bear Loss as a Factor in the Decision of Certain Types of Tort Cases*, 78 U. Pa. L. Rev. 805 (1930).

36. Donnelly, *supra* note 35, at 21 n.43 (1948); Leflar, *Radio & TV Defamation: "Fault" or Strict Liability*, 15 Ohio St. L.J. 252, 266 n.57 (1954).

37. See, *e.g.*, Donnelly, *supra* note 35; Morris, *supra* note 33. Newspaper libel constitutes the vast majority of libel by extrinsic fact cases.