Marquette Law Review

Volume 34
Issue 1 *Summer 1950*

Article 7

Torts - Communist Not Slander Per Se

Emil Sebetic

assert no tort claim against his benefactor.[16] However, Neil, Ch. J., in *Gamble v. Vanderbilt University*[17] says:

> "There are cases from time to time occurring, and not altogether infrequent, to which it is, as it seems to us, impossible to apply it—patients conveyed to hospitals in demented condition, persons temporarily unconscious from injuries and who require immediate surgical and other attention, those who are so debilitated by disease to have no power of understanding the terms of a contract, children too young to understand the meaning of a contract, or to make or be bound by one in any form, or even to understand the nature of the work to be done for them. How can such persons be held to waive a right of action which the law gives them? How can they be held to have agreed to an exemption?"

Some courts refuse to recognize any of these doctrines and hold a charitable institution liable if negligent.[18] Courts generally impose liability where a stranger is injured by defendant's agents,[19] or to a servant,[20] or to a business visitor,[21] or if a safe place statute is applicable.[22]

JOHN D. STEIN

Torts — Communist not Slander per se — Plaintiff, business manager for a labor union, brought action for slander. The complaint alleged the defendants said, "He, Plaintiff, is a dirty low down Communist, that Mr. Krumholz, Plaintiff, and the union are a bunch of Communists, and that Mr. Krumholz is a dirty Communist." Defendants moved for dismissal on the grounds that the complaint was legally insufficient, and did not state a cause of action. *Held:* The New York Supreme Court, Special Term, ruled that calling a person a Communist was not slander per se and could not be maintained in the absence of allegations that plaintiff suffered damage through injury to his business or property. The complaint was dismissed with leave to amend. It was necessary to plead that the statements made referred to or concerned the plaintiff in his business for the words to be actionable per

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[16] Mikota v. Sisters of Mercy, 183 Iowa 1378, 168 N.W. 219 (1918); Burdell v. St. Luke's Hospital, 37 Cal. App. 310, 173 P. 1008 (1918).
[17] 138 Tenn. 616, 200 S.W. 510 (1917).
[18] Basabo v. Salvation Army, 35 R.I. 22, 85 A. 120, 14 A.L.R. 576 (1912).
[19] Marble v. Nicholas Senn Hospital Asso., 102 Neb. 343, 167 N.W. 208 (1918); Simmon v. Wiley M. E. Church, 112 N.J.L. 129, 170 A. 237 (1934).
[20] Hordern v. Salvation Army, 199 N.Y. 233, 92 N.E. 626 (1910).
[21] Cohen v. General Hospital Soc. of Connecticut, 113 Conn. 188, 154 A. 435 (1931).
[22] Wilson v. Evangelical Luthern Church, 202 Wis. 111, 230 N.W. 708 (1930); Wis. Stat. (1947) sec. 101.06 provides: ". . . Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair, or maintain such place of employment or public building . . . as to render the same safe."

se. There was no such allegation, and it cannot be said as a matter of law that the words used concerned the plaintiff in his business. *Krumholz v. Raffer et.al., 91 N.Y.Supp.(2d.) 743. (New York 1949).*

This court applied the common law rule that in slander not actionable per se, special damages or injury to property or business must be alleged to recover. This case did not fall within the slander per se cases because it did not involve words imputing commission of a punishable offense, or words imputing a contagious disease, or words imputing unfitness to perform duties or public office, or words which tend to prejudice the party in his profession or trade.[1] The rules for slander were developed in four different courts of England; the local, ecclesiastical, common law, and Star Chamber. There was no distinction between libel and slander in the local, ecclesiastical or common law courts. The remedy for defamation was the action of trespass on the case for words spoken, the essence of that action being the pleading and proving of damage, if the words were not such that damage would be presumed. The distinction between libel and slander developed with the advent of printing, when the Star Chamber took jurisdiction over printed matter and all writing generally and introduced for the first time into English law a new type of defamation based upon mere form. Libel for written defamation was actionable without proof of special damages, because the damage was presumed; while slander for spoken defamation if not actionable per se could only be maintained by pleading special damages or injury to the plaintiff's business or property.[2] The common law rule is still the rule today and is part of the Restatement of Torts.[3]

The primary reason assigned by the courts to justify the imposition of broader liability for libel than for slander has been the greater capacity for harm that a writing is assumed to have because of a wide range of dissemination consequent upon its permanence in form.[4] In the instant case the judge ruled that calling a person a Communist is not slanderous per se, and allegation of special damages became necessary to maintain the action,[5] because words not actionable in themselves become so only by reason of some special damage occasioned by them, and such special damage must be averred particularly in the complaint.[6]

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[1] Pollard v. Lyon, 91 U.S. 225, 226, 23 L.Ed. 308 (D.C., 1876).
[2] History of Defamation, 1949:99-126, Wis.L.Rev.; Restatement of Torts, Section 568, note (b).
[3] Restatement of Torts, Sections 570, 571, 572, 573, 574, 575; Pollard v. Lyon, Fn. 1, supra.
[4] Hartman v. Winchell, 73 N.E. (2d) 31, 34, 171 A.L.R. 759 (N.Y., 1947).
[5] Waldron v. Time Inc., 83 N.Y.Supp. (2d) 826 (1948).
[6] 53 C.J.S. 269, Section 170 (c); Bush v. McMann, 12 Colo.App. 504, 55 Pac. 956 (1899); Field v. Colson, 93 Ky. 347, 20 S.W. 264 (1892; Fillman v. Drefous, 47 L.Ann. 907, 17 So. 422 (1895).

Although calling a person a Communist is not slander per se, it has been held libel per se to write that a person is a Communist,[7] because the label of Communist today in the minds of many average respectable persons places one beyond the pale of respectability, and makes him a symbol of public hatred.[8] The fact that it may be legal to be a Communist or a Communist sympathizer does not prevent such a charge from being libelous per se, as a publication need not impute a crime to constitute a libel.[9]

Today and for some time in the past, there has been widespread public aversion for Communism, its adherents and sympathizers. Whether or not Communism stands for violent overthrow of our government or orderly process of political activity—in either interpretation or understanding a large segment of our populace attaches to the activities of Communists an odorous interpretion that tends toward public aversion.[10]

Canada, among the common law countries, has taken the initiative in merging libel and slander through its conference of Commissioners on Uniformity of Legislation which, in 1944, prepared a Uniform Defamation Act. The act abolishes the distinction between libel and slander and makes all defamatory publications actionable without proof of damages or, as the Act puts it, "damage shall be presumed."[11] Thus in the jurisdictions in Canada where this act has been enacted the plaintiff in the instant case could have maintained his action and recovered without pleading special damages.

It is the opinion of the writer that the distinction between libel and slander should remain in the law. In the instant case, had the plaintiff suffered damage to his property or business he could have recovered as the decision intimated. Therefore his remedy was adequate, for the purpose of civil law is reparation and compensation, not punishment. The distinction between spoken and written words as to permanence and effect seems as sound now as it was when the rule was first declared. The reason for the distinction still exists. The Canadian rule opens the door to recovery at random for mere name calling in the absence of damage, and leans toward liability based upon punishment, not reparation or compensation.

EMIL SEBETIC

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[7] Burrell v. Moran et.al., 82 N.E. (2d) 334 (Ohio, 1948); Levy v. Gelber, 175 Misc. 746, 25 N.Y.Supp. (2d) 148 (1941); Oppenheim v. Gunther, 85 N.Y. Supp. (2d) 210, 193 Misc. 914 (1948); Notre Dame L.Rev. 24:542-9 (Summer 49).

[8] Spanel et.al. v. Pegler, 160 F.(2d) 619, 571 A.L.R. 699 (Fed.Ct., 1947).

[9] Fn. 8, supra.

[10] Burrell v. Moran et.al., Fn. 7, supra.

[11] The Act was encated as law by Manitoba, 1946 (1946,Man.C.11), and by Alberta, 1947 (1947,Abta.C.14).