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Torts - Libel and Slander - Innuendo

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injuries and results therefrom which would not have occurred except for the negligence of a responsible person, would also, in many instances, work injustice. In the choice thus presented between two interested persons, one breaching the law imposed upon him of exercising due care, and the other being without fault, the courts favor the innocent party and lay the entire responsibility upon the one breaching his legal duty.

In the final analysis, the determination of a case involving the question of foreseeability and intervening cause must depend upon an appraisal of the totality of facts and circumstances in the individual case, and the application of the rules of law to the results of such appraisal.

ANTHONY FRANK.

Torts—Libel and Slander—Innuendo.—Plaintiff brought suit for libel on the basis of articles appearing in the newspaper of the defendant publisher. In commenting editorially on the settlement of claims of the county against former officials for alleged fraudulent land tax deals, the defendant charged that in the past, members of the highway committee had made money on the sale of road machinery to the county. In a subsequent issue, the editor qualified his statement by adding that the reference was not to present committee members but to those of many years ago. Thereafter, plaintiff, who had been a committee man ten years previous to the statement, sent a letter to the defendant requesting an express retraction if the charge did not refer to him. Defendant published plaintiff's letter in connection with an editorial stating that if the plaintiff had attended Christmas eve services in any of the town churches he "would have gotten a lot of good out of it and felt a whole lot better." Plaintiff alleged that by innuendo, defendant's statement accused him of such a general lack of Christian virtue as to require his attendance at church services. Defendant demurred, contending that the alleged defamatory statement standing alone without the innuendo did not in any way injure the plaintiff's character or subject him to ridicule and contempt; and that no innuendo could alter the sense of a statement or supply a meaning not obviously present. The trial court overruled the demurrer and defendant appealed from the order.

On appeal, *held,* order reversed. No innuendo can alter the sense of the alleged derogatory statement, or supply a meaning which is not there. The court must determine as a matter of law whether the language complained of is capable of the meaning ascribed to it by the complaint. *Luthey* v. *Kronschnabl,* 1 N.W. (2d) 799 (Wis. 1942).

There is a great deal of diversity of opinion in various jurisdictions as to the role which innuendo may play in libel actions where the defamatory meaning of the words is not immediately apparent. A comparison of the various positions adopted by courts can best be made if the well recognized distinction between words libellous per se and those libellous per quod is kept in mind. In the former situation, the effect of the words is so direct that damages will be presumed by the court; while in the latter, no such presumption arises, and if the plaintiff is to succeed, he must make proof of actual damages. The function of innuendo differs in each case, and the differences are so great as to necessitate separate examination.

When the theory of the plaintiff's action is that the words were defamatory in themselves, a numerical majority of the courts will not allow him to assign

a meaning by innuendo. *Old Dearborn Distributing Co.* v. *Seagram Distilling Corp.*, 288 Ill. App. 79, 5 N.E. (2d) 610 (1937), *Kassowitz* v. *Sentinel*, 277 N.W. 177 (Wis. 1936), *Ellsworth* v. *Martindale-Hubbell Law Dictionary*, 268 N.W. 400 (N.D. 1936). In other words, in these states the question is one of the normal unstrained meaning of the words employed. A strong minority, however, adopts a freer interpretation of the phrase "ordinary meaning of the words" and approaches the problem of a derogatory meaning present in a statement by innuendo in this fashion: if the words are ambiguous and capable of several meanings, one of which is actionable in se, the plaintiff may plead the meaning which he claims as the basis of his cause of action. These courts look upon such a pleading, not as an extension of the meaning of a statement or as an averment of special damages because of defamatory understanding, but as the statement of an actionable meaning which while not apparent, was always inherent in the statement. *Furr* v. *Foulke*, 266 N.W. 687 (S.D. 1936), *Bradstreet* v. *Gill*, 72 Tex. 115, 9 S.W. 753 (1888); *Maas* v. *National Casualty Co.*, 97 F. (2d) 247 (C.C.A. 4th 1938); *Washington Post* v. *Chaloner*, 250 U.S. 290, 39 Sup. Ct. 448, 63 L.Ed. 987 (1919).

Some courts of the majority which refuse to allow an innuendo to determine the meaning of an ambiguous statement have carried this policy to the extreme of throwing a plaintiff into a libel per quod action if he averred any extraneous facts surrounding the publication on which he brought suit. Clarity of legal thought has been sacrificed for example, when a court which denied the ability of an innuendo to change the natural import of the words was faced with the following situation: an actress brought suit on the basis of a picture and article which described her as the lady love of a famous comedian. Without showing special damages, the plaintiff contended that the words in their most innocent sense became actionable in the light of the additional fact that she was a married woman. In an opinion, two judges dissenting, the court decided that the plaintiff was properly allowed to assert the fact of her marital status, though neither the majority or minority questioned that such was a pleading by innuendo. *Sydney* v. *McFadden Newspaper Publications*, 242 N.Y. 208, 151 N.E. 209 (1926). Likewise, several southern courts by their strict adherence to the letter of the majority rule have precipitated themselves unnecessarily into a discussion of innuendo in libel in se actions based on articles describing a man as colored when in fact he was white. *Upton* v. *Times-Democrat Pub. Co.*, 104 La. 141, 28 So. 970 (1900); *Flood* v. *News and Courier Co.*, 71 S.C. 112, 50 S.E. 637 (1905).

These courts are apparently using innuendo in its widest sense: to cover every averment which is not immediately apparent from the statement on which the complaint is based, whether such averment resolves an ambiguity in meaning or describes the circumstances making the statement actionable. Logic would seem to be with the courts restricting the use of the term innuendo and the prohibitions surrounding its use to pleadings of the former type. When the term is used in a wider sense than this, courts involve themselves in at least an apparent contradiction of the rule that the standard of interpretation of an article allegedly defamatory is how those in the community would reasonably understand the statement. Facts attending publication but extraneous to it can give to an apparently innocent article a nuance of meaning which could not be detected merely from an examination of the words used. *Hubbard* v. *Associated Press*, 123 F. (2d) 864 (C.C.A. 4th, 1941).

An entirely different rule applies to the pleading of innuendo in actions on the theory of libel per quod. In such cases innuendo is almost universally

admitted, and the cases seem concerned with two questions—(1) the differences between libel per se and per quod, and (2) the uses to which innuendo can be put to make out a case.

From the standpoint of damages, the distinguishing factor between libel in se and per quod seems to be the obviousness and directness of the damage done to the plaintiff by the statement. "A publication is not of itself libellous unless the language as a whole in its ordinary meaning naturally and proximately was so injurious to the plaintiff that the court will presume without proof that his credit or reputation have been thereby impaired." *McAuliffe* v. *Local Union No. 3 IBEW,* 29 N.Y.S. (2d) 963 (1941), following *O'Connell* v. *Press Publishing Co.,* 214 N.Y. 352, 108 N.E. 556 (1915); see also *Ellsworth* v. *Martindale-Hubbell Law Dictionary Co.,* supra.

The most stringent application of the above rule is that governing libel in se actions in Connecticut, where in an early case, a candidate for political office brought an action against a person who accused him of violating the election laws by having liquor bought for voters. After denying the ability of innuendo to change the sense of words not actionable in themselves where no special damages were shown, the court stated: "To be actionable in se, the words must not only impute to the plaintiff a violation of a penal or criminal law, but it must charge him with a crime involving moral turpitude or subjecting him to an infamous punishment." *Hoag* v. *Hatch,* 23 Conn. 585 (1855).

New York, on the other hand, is rather lenient in its view of what constitutes libel in se. In a case tried in the federal court under New York law, the defendant newspaper was accused of charging that the plaintiff Congressman had opposed the appointment to the Federal bench of a named individual because of the latter's religion and foreign birth. Defendant contended that such a charge became actionable only if special damages could be shown, and innuendo pleaded, but a divided court found the charge libellous in se and laid down the following as New York law:

1. A false statement need not charge a violation of any law to be actionable in se.
2. False statements which might lead right thinking people to think a public official less fit to hold office are actionable in se.
3. The falsehood need not make even a majority of the readers think less of the person defamed in order to be libellous in se. *Sweeney* v. *Schenectady Union Publishing Co.,* 122 F. (2d) 288 (C.C.A. 2d, 1941).

When, however, suit is brought on the theory of libel per quod, the plaintiff pleads that the defamation is actionable because of the meaning which was conveyed to the readers and the actual provable losses which he suffered thereby. Special significance which the words had because of their reference to preceding facts and exterior circumstances may and often must be alleged; and often the procedure followed is the pleading of innuendo. *Ellsworth* v. *Martindale-Hubbell Law Dictionary,* supra, illustrates pointedly the additional burden of proof the plaintiff must bear when the court decides that the words are not libelous in se.

In the case last mentioned, the plaintiff's attorney sued the defendant publisher because of blanks following his name in defendant's directory of attorneys. Plaintiff alleged that the possessors of the key to the ratings were given an untrue and defaming picture of his ability, credit, and recommendations. The court decided that the blanks were not libellous in se, and hence were not actionable unless the plaintiff gave to them by innuendo a meaning which they did not of themselves possess. Moreover, even if he did so, the plaintiff assumed

the burden of proving not the tendency of the words to cause damage, but of proving the actual damages caused.

Furthermore, in a per quod action, the assigning of a defamatory meaning by innuendo coupled with proof of special damages does not lead to recovery in all cases, for damages which were voluntarily incurred have been held to be not recoverable. In a 1941 case, Ohio courts refused to allow recovery when the article complained of fell into the above category. Plaintiff was a minister and the sponsor of proposed amendments to the state constitution. He was accused by the defendants of being a paid lobbyist and he brought suit, alleging that the statement, by innuendo, accused him of being connected with a tax movement opposed to the best interests of the people and of being a person of ill repute who would work for any interest if compensated according to his price. As items of special damage he listed the expenses incurred by him in denying the charges. On the ground that the items were voluntarily incurred, the court denied recovery.

There is a further division of authority on the question of the province of the court and jury in a trial where innuendo may be alleged. The principal case holds that it is for the court to determine whether the innuendo on which the complaint is based is properly ascribed to the statement. These are cases to the contrary. *Pollard* v. *Forest Lawn Memorial Park Ass'n.*, 59 P. (2d) 203, 15 Cal. App. (2d) 77, (1936); *Lily* v. *Belk's Department Store,* 182 S.E. 889, 178 S.C. 278 (1935); *Stampler* v. *Richmond,* 125 Pa. Sup. 385, 189 A. 730 (1937).

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