



Supreme Court of Vermont.

Ronald LENT

v.

H.J. HUNTOON and Huntoon Business Machines,
Inc.

No. 82-155.

Nov. 1, 1983.

Defamation is comprised of the complementary torts of libel and slander. Although these torts evolved from different antecedents, both were eventually cognizable in the King's courts in England prior to reception of the common law in Vermont. See generally Veeder, *The History and Theory of the Law of Defamation*, 3 Colum.L.Rev. 546 (1903); W. Prosser, *Handbook of the Law of Torts* 737-39 (4th ed. 1971). Because of the permanence of the written word, libel was considered the more serious tort, with slander, or the spoken word, considered the less serious. The distinction between written and spoken defamation has resulted in a host of special rules with corresponding special legal terminology. Herein lies much of the confusion which abounds even today.

[1][2] Libel is generally considered "actionable per se"; that is, the plaintiff need not allege nor prove that he or she suffered any "special damages" as a direct or proximate result *546 of the libel. Special damages, in short, are presumed. Special damages have a unique connotation in the law of defamation. Special damages are those of a pecuniary nature, and historically they have included loss of customers or business, loss of contracts, or loss of employment. W. Prosser, *supra*, at 760-61. In addition,

modern decisions have shown some tendency to liberalize the old rule, and to find pecuniary loss when the plaintiff has **1168 been deprived of benefit which has a more or less indirect financial value to him. Thus the loss of the society, companionship and association of friends may be sufficient when ... it can be found to have a money value.

Restatement (Second) of Torts § 575 comment b, at 198 (1977).

[3] Slander, on the other hand, is generally not actionable per se; that is, special damages are not presumed and must be alleged and proven. Several kinds of slander, however, were identified at English common law as more serious than others and these

were held to be actionable per se. Spoken defamation involving (1) imputation of a crime, (2) statements injurious to one's trade, business or occupation, or (3) charges of having a loathsome disease were deemed slander per se and were actionable without proof of special damages. W. Prosser, *supra*, at 754. The decisions of our Court are in accord with this common law exception. Most American jurisdictions added still a fourth exception: charging a woman to be unchaste. Thus "actionable per se" simply means special damages need not be proved in libel actions or in those slander actions which fall into one of the exceptions categorized as slander per se.

[4] The general elements of a private action for defamation (libel and/or slander) are: (1) a false and defamatory statement concerning another; (2) some negligence, or greater fault, in publishing the statement; [FN1] (3) publication to at least *547 one third person; (4) lack of privilege in the publication; (5) special damages, unless actionable per se; and (6) some actual harm so as to warrant compensatory damages.

[FN1]. Element (2) is required by the United States Supreme Court. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347, 94 S.Ct. 2997, 3010, 41 L.Ed.2d 789 (1974), the Court observed: "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability [in defamation actions]." Thus, strict liability for all state defamation now appears impermissible. See Restatement, *supra*, § § 558, 580B. *Gertz* also requires element (6). 418 U.S. at 349, 94 S.Ct. at 3011. See text *infra*.

[5] For reasons probably lost in history, a special rule of procedure developed for the trial of a defamation action. Once the plaintiff's evidence was in, the court had to determine whether the written or spoken words were defamatory as a matter of law. If the court was in doubt because the connotation of the written or spoken words was ambiguous, then the court had to submit the question to the jury to decide. *Lancour v. Herald & Globe Association*, 111 Vt. 371, 379, 17 A.2d 253, 256 (1941) (*Lancour I*). In libel actions, when the court determined that the written words were libelous as a matter of law, the term "libel per se" was used. This unfortunate terminology when used in conjunction with such terms as "slander per se" and "actionable per se" has

greatly confused courts and counsel. "Libel per se" simply means defamatory as a matter of law. Since all libel is actionable per se, it makes no difference whether the court rules that the written words are defamatory as a matter of law, or that the written words are ambiguous and the jury determines that there is defamation; in each instance special damages need not be proven.

A further complication in the semantics of defamation law arose when the courts embarked upon the "spurious" concept of a "libel per quod." Eldredge, *The Spurious Rule of Libel Per Quod*, 79 *Harv.L.Rev.* 733 (1966). This rule only served to compound an already confusing area of the law of torts. Being written, libel is generally evaluated by examining the four corners of the writing itself. A letter or newspaper article can be introduced at trial and its defamatory nature determined by judge or jury as appropriate. Some writings, however, are seemingly innocent in and of themselves, and resort must be had to extrinsic evidence to determine if they have defamatory qualities. If the writing together with the extrinsic evidence constitutes defamation, such a writing is referred to as "libel per quod" in several American jurisdictions. *50 Am.Jur.2d Libel and Slander § 9*. These **1169 jurisdictions require that special damages be proven for libel per quod, unless the libel falls into one of the exceptions we previously mentioned as constituting slander per se. Thus, under this rule, the simple fact *548 that extrinsic evidence must be used to prove the defamatory nature of a libel prevents it from being "actionable per se" and special damages must be proven.

A scholarly debate concerning libel per quod took place before the Restatement (Second) of Torts was published. Prosser, *Libel Per Quod*, 46 *Va.L.Rev.* 839 (1960); Eldredge, *supra*; Prosser, *More Libel Per Quod*, 79 *Harv.L.Rev.* 1629 (1966). Thereafter, section 569 of the Restatement reflects the simpler rule and rejects any notion of libel per quod.

[6][7] Vermont's reported decisions do not recognize libel per quod, and we adhere to the wisdom of that course today. We hold that libel, whether defamatory on the face of the writing alone or with the aid of extrinsic evidence, is actionable per se. Our previous use of the term libel per se in no way, directly or inferentially, encompasses the rule of libel per quod. In the appropriate circumstances we recognize that libel per se may be found either solely from the writing or from the writing together with extrinsic evidence. Similarly the question of

whether an ambiguous writing is defamatory or not is a jury question under either set of circumstances.

[9][10][11][12] In the case before us the pleadings include one count sounding in libel and one count sounding in slander. Two defenses to these allegations of defamation are raised: truth and privilege. Truth, of course, defeats the action and is a complete defense to defamation. See *Lancour I, supra*, 111 Vt. at 379, 17 A.2d at 256; Restatement, *supra*, § 581A; *50 Am.Jur.2d Libel and Slander § 179* (citing *Lancour I* in note 8). The privilege raised here is a conditional privilege which may be overcome by a showing of malice. [FN2] The defendants allege a privilege to *549 protect their legitimate business interests. This privilege is recognized in *Restatement (Second) of Torts, supra, § 595* comment d, and we hold it to be applicable in Vermont. The burden of proving the privilege is on the defendants. Restatement, *supra*, § 613(2); *50 Am.Jur.2d Libel and Slander § 451*.

[FN2] Malice is raised in this case in two separate contexts: malice must be shown to defeat a conditional privilege, and malice must be shown before the jury can consider punitive damages. Although the same evidence may be used to prove both kinds of malice, as legal elements they operate independently. See also *infra* notes 3 and 4.

[13][14] A showing of malice, however, may defeat the conditional privilege, Prosser, *Handbook of the Law of Torts, supra*, at 794, but in such instance the plaintiff must show malice by clear and convincing proof. In this sense malice may be either actual or implied. The court will infer malice upon a showing that the defendant knew the statement was false or acted with reckless disregard of its truth. See Restatement, *supra*, § 600. Actual malice includes spiteful or wanton conduct. *Id.* at § 603 comment a.

[15][16] This case also raises the issue of general and punitive damages in defamation. At the outset, we must observe that even though libel and some forms of slander are actionable per se and special damages need not be proven, a plaintiff can no longer recover general damages without a showing of some harm. In *Gertz v. Robert Welch, Inc., supra*, the United States Supreme Court noted that state remedies for defamation must be restricted "to compensation for *actual injury*." *Id.* 418 U.S. at 349, 94 S.Ct. at 3011 (emphasis added). This, of course, applies to general or compensatory **1170 damages

that "include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id.* at 350, 94 S.Ct. at 3012. This was recognized in *Colombo v. Times-Argus Association, Inc.*, 135 Vt. 454, 455, 380 A.2d 80, 82 (1977). We are persuaded and now hold that liability for defamation must logically be based on some showing of harm to the plaintiff. Thus, Vermont will require defamation plaintiffs to demonstrate some "actual harm" as a prerequisite to recovering general damages. To the extent that *Lancour v. Herald & Globe Association*, 112 Vt. 471, 475, 28 A.2d 396, 399 (1942) (*Lancour II*) allowed recovery of general damages "without proof of loss or injury," it is overruled. Likewise, to the extent that our recent opinion *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 461 A.2d 414 (1983), relied on that aspect of *Lancour II*, *supra*, it has no force. In summary, defamation that is actionable per se will require some showing of actual harm, but not of special damages *550 before recovery of general, or compensatory, damages. This sound rule is reflected in the Restatement, *supra*, § 621.

[17][18] Finally, this case raises the question of punitive damages. Once general (compensatory) damages are established, *Allard v. Ford Motor Credit Co.*, 139 Vt. 162, 164, 422 A.2d 940, 942 (1980), punitive damages may be awarded on a showing of actual malice, [FN3] *Lancour II*, *supra*, 112 Vt. at 478, 28 A.2d at 401, but actual malice may not be considered to enhance compensatory damages. *Id.* at 480, 28 A.2d at 402. "[Malice] may be shown by conduct manifesting personal ill will or carried out under circumstances evidencing insult or oppression, or even by conduct showing a reckless or wanton disregard of one's rights." *Shortle v. Central Vermont Public Service Corp.*, 137 Vt. 32, 33, 399 A.2d 517, 518 (1979), quoted in *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, *supra*, 143 Vt. 77, 461 A.2d at 419. Malice supporting punitive damages may be shown by proving that the defendant repeated the defamatory statement, especially when the repetition occurred after commencement of the lawsuit. *Lancour II*, *supra*, 112 Vt. at 480, 28 A.2d at 402.

[FN3]. "Actual" is used here to emphasize the factual basis of this malice. Since punitive damages are within the jury's discretion, they must be based on "actual" evidence of malice, rather than implied or constructive malice.

[19] Once malice sufficient to entitle plaintiff to

punitive damages has been shown, the plaintiff may present evidence of defendant's financial condition: "Where exemplary damages are awardable ... the defendant's pecuniary ability may be considered in order to determine what would be a just punishment for him." *Kidder v. Bacon*, 74 Vt. 263, 274, 52 A. 322, 324 (1902).