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Torts--Libel in New Mexico--Reed v. Melnick

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COMMENT

TORTS—LIBEL IN NEW MEXICO—*REED v. MELNICK*

This comment will examine the recent New Mexico Supreme Court decision of Reed v. Melnick, in which the court adopted new rules concerning libel in New Mexico. A discussion of the historical treatment of defamation will enable the reader to familiarize himself with certain terms analogous to the study of libel.

I

HISTORICAL BACKGROUND AND TREATMENT OF DEFAMATION

The wrong of defamation is sometimes a crime,[1] sometimes a tort, and sometimes can be treated either as a crime or a tort at the choice of the injured party.[2] The rules of defamation vary—depending on the treatment as a crime or a tort, and depending on the manner of publication, be it by word of mouth (slander) or by means of a writing (libel). How and why the distinctions between libel and slander arose are not entirely clear. The distinctions seem not to rest upon any sound or fundamental basis, but apparently upon an anomolous historical development.[3]

In the middle ages, the only remedy available for defamation was in the ecclesiastical courts. Later, in the sixteenth and seventeenth centuries, the common law courts began to compete in this field of jurisdiction, and soon deprived the ecclesiastical courts of most of their power. At the same time, the star chamber assumed jurisdiction over all matters concerning the press, and the criminal process of libel arose. When the star chamber was abolished, the law of defamation thus consisted of two very divergent parts.[4] To a great extent, those distinctions[5] exist today.

As the common law developed, any publication in the form of libel was actionable if, in fact, it defamed the plaintiff, regardless of

1. *See* N.M. Stat. Ann. 40A-11-1 (Repl. 1964).

2. Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries,* 40 L.Q. Rev. 302 (1924).

3. Carpenter, *Libel Per Se in California and Some Other States,* 17 So. Cal. L. Rev. 347 (1944).

4. Holdsworth, *supra* note 2, at 305.

5. *See* 8 Holdsworth, History of English Law 346-54 (4th ed. 1926), and Plunknett, A Concise History of the Common Law 427-45 (2d ed. 1926). *See also* Thorley v. Kerry, 4 Taunt. 355, 128 Eng. Rep. 367 (1812), in which Sir James Mansfield, Chief Justice of the Court of Common Pleas, decried the wisdom of continuing those distinctions, but authored the very decision which has been said to have vastly reinforced those same distinctions.

whether the words appeared defamatory on their face or whether they caused special damages.[6]

Slander, on the other hand, was divided into two categories: slander per se, and slander per quod. Slander was actionable without proof of special damages only if it fell into the per se category.[7] The per se category included only three classes of defamation where there were imputations of: (1) a crime; (2) a loathsome disease; and (3) conduct or characteristics incompatable with the plaintiff's trade or profession. A fourth category[8] (that of the imputation of unchastity to women) was sometimes added in more recent decisions. Slander per se was actionable without allegations of special damages[9] regardless of whether the defamatory character appeared on the face of the statement[10] or was latent and required a showing of extrinsic[11] matter to make it appear derogatory.[12] Any slander not falling into one or more of the per se categories was known as slander per quod. Slander per quod was actionable only upon allegation and proof of special damages.[13]

Thus, at common law and in England today, only slander was broken down into the per se–per quod categories.[14] Any publication in the form of libel was actionable without proof of special damages.[15]

II
DEFAMATION IN NEW MEXICO

New Mexico decisions dealing with defamation have gradually

6. *See* Carpenter, *supra* note 3, at 347; *see also* Prosser, Torts, 780-83 (3rd ed. 1964).

7. Sometimes known as *slander actionable per se. See* Gatly, Libel and Slander 47 (5th ed. 1970).

8. *See* Prosser, *supra* note 6, at 772-78 for an extensive outline of all slander actionable without proof of special damages; *see also* Prosser, *Libel Per Quod,* 46 Va. L. Rev. 839-40 (1960).

9. Restatement of Torts § 574, at 183, 84 (1938); Prosser, *supra* note 6, at 772, *see also* Restatement (Second) of Torts § 574 (1966).

10. Known as *patent* defamation.

11. In a defamation action, the *inducement* supplies allegations of fact extrinsic to the published matter itself. The inducement's principle function is to supply extrinsic facts which render material non-defamatory on its face capable of having a defamatory meaning. Henn, *Libel-by-Extrinsic-Fact,* 47 Cornell L.Rev. 14-19 (1961).

12. That part of the declaration which explains the meaning of the published matter, either by itself, or with the extrinsic facts alleged in the inducement is known as the *innuendo.* Henn, *id,* at 20.

13. *See* Prosser, *supra* note 6, § 107, at 778.

14. *See* Wade, *Defamation,* 66 L.Q. Rev. 348, 349 (1950); *also* Youssoupoff v. Metro Goldwin-Mayer Pictures, 50 T.L.R. 581, 99 A.L.R. 864 (1934).

15. Harper, A Treatise on the Law of Torts § 243 (1933).

strayed from the common law principles.[16] In *Dillard v. Shattuck,*[17] a slander case decided in 1932, the Supreme Court of New Mexico held: (1) that in determining whether alleged defamatory words are slanderous per se, any innuendo is to be disregarded;[18] (2) that language claimed to be actionable will receive an innocent interpretation when fairly susceptable of it and that words will be construed in a defamatory sense only if that is their plain and obvious meaning;[19] (3) that the language claimed as slanderous must be construed as a stranger might look at it without the aid of any knowledge possessed by the parties concerned;[20] and (4) that oral defamation is to be more strictly construed than libel.

Until *Chase v. New Mexico Publishing Co.*[21] (1949), New Mexico had followed orthodox rules of libel.[22] Prior to *Chase,* libel per se meant all libel, be it patent or latent.[23] In *Chase,* the New Mexico Supreme Court defined libel per se to mean patent defamation (*i.e.,* where the defamatory impact was formed by the words alone, without recourse to extrinsic matter or innuendo). All other libel was classified as libel per quod. Thus, if the libel was not patent, allegation and proof of special damages was to be required.

Three years later, in *Del Rico Co. v. New Mexican, Inc.,*[24] the innocent meaning rule[25] was adopted for cases involving libel. In *Del Rico,* the court also set strict guidelines on the sufficiency of general allegations of special damages.[26]

16. *See* Comment, *Torts–Libel and Slander–The Libel Per Se-Libel Per Quod Distinction in New Mexico,* 4 Natural Resources J. 590 (1965), for a review of the development of the rules of libel in New Mexico.

17. 36 N.M. 202, 11 P.2d 543 (1932).

18. This was contra to the existing New Mexico law as well as to the common law treatment of libel.

19. This *innocent meaning rule* was first applied to libel in Del Rico Co. v. New Mexican, Inc., 56 N.M. 538, 246 P.2d 206 (1952), and was later cited in McGaw v. Webster, 79 N.M. 104, 440 P.2d 296 (1968); Thomas v. Frost, 79 N.M. 125, 440 P.2d 800 (Ct. App. 1968); and in Reed v. Melnick, 81 N.M. 608, 471 P.2d 178 (1970).

20. It is a small consolation for a plaintiff who has been shunned by his friends to learn that he has not been defamed in the eyes of strangers. Comment, *Libel Per Se and Special Damages,* 13 Vand. L. Rev. 730, 743 (1960).

21. 53 N.M. 145, 203 P.2d 594 (1949).

22. Comment, *supra* note 16, at 598.

23. *Id.*

24. Del Rico Co. v. New Mexican, Inc., 56 N.M. 538, 246 P.2d 206 (1952).

25. As first set forth in the slander action of Dillard v. Shattuck, 36 N.M. 202, 11 P.2d 543 (1932).

26. Quoting Newell, *Slander and Libel* 841-44, (4th ed. 1924), the court stated:

> An allegation stating generally that in consequence of the defendant's words the plaintiff has lost a large sum of money, or that his practice or business has declined, is not sufficiently precise where the words are not actionable per se. The names of the persons who have ceased to employ the plaintiff, or would

Thus, after the *Chase* and *Del Rico* decisions, a plaintiff who wished to have alleged defamatory writings labeled libelous per se,[27] faced the task of convincing the court[28] that the words could not be interpreted in any innocent manner whatsoever, and that the alleged defamatory words were libelous on their face[29] without reverence to any innuendo or extrinsic matter. If the plaintiff failed to convince the judge that the words were libelous per se, specific allegations of special damages were required to be stated and proven—a task so difficult, that since the formulation of the rules outlined in *Chase* (1949) and *Del Rico* (1952), not one appellate case can be found in New Mexico where a plaintiff has won a suit in which the words have been labeled libel per quod.

Cognizant of the question of the validity of the libel per se-per quod distinction, the dissenting Justices Moise and Carmody noted in *McGaw v. Webster*,[30] that a re-examination of the distinction should be made. In *Thomas v. Frost*,[31] the Court of Appeals considered the plaintiff's contention that the libel per se-per quod distinction be re-examined, but refused to do so due to the recentness (three weeks) of the *McGaw* decision. A year and one half later, the question was again raised.[32] This time a revision of the rules of libel was to come.

III
REED v. MELNICK

The *Reed v. Melnick* dispute arose over an allegedly libelous letter[33] sent by defendant Melnick to the Hartford Fire Insurance

have commenced to deal with him had not the defendant dissuaded them, should be set out in the statement, and they themselves called as witnesses at the trial to state their reason for not dealing with the plaintiff.

27. Actionable without proof of special damages. *See* Chase v. New Mexico Publishing Co., 53 N.M. 145, 203 P.2d 594 (1949).

28. Though apparently not mentioned in a New Mexico decision, it has traditionally been accepted as a matter of law whether a statement is capable of a defamatory meaning. *See* Restatement of Torts, § 614 (1938).

29. Defined in Chase v. New Mexico Publishing Co., 53 N.M. 148, 203 P.2d 595, as "[a]ny false and malicious writing published of another is libelous per se, when its tendency is to render him (the plaintiff) contemptible or ridiculous in public estimation, or expose him to public hatred or contempt, or to hinder virtuous men from associating with him."

30. 79 N.M. 104, 108, 440 P.2d 296, 301 (1968).

31. 79 N.M. 125, 128, 440 P.2d 800, 803 (Ct. App. 1968).

32. In Reed v. Melnick, 81 N.M. 14, 462 P.2d 148 (Ct. App. 1969).

33. *Id.*, at 15. The text of the letter read:

Please cancel the attached PN 46 HO 210678 for insureds Earl R. Buss and Lillian Buss. They have sold the property and wish refund. Please send refund to this office as we must finish disbursements of the closing.

Cancellation should be effective 12-8-67, date of sale. We have just received the original policy back from the lienholder. Under no circumstances send the

Company, for whom plaintiff was then agent. Plaintiff brought suit in the district court of Los Alamos County, contending that the letter contained matter defamatory and of a prejudicial nature against the plaintiff in relation to his business and that the letter was defamatory on its face without resort to innuendo or inducement. Plaintiff did not allege special damages in his complaint.

Defendant Melnick contended the words were not libelous on their face,[34] were not susceptable of a single and defamatory meaning,[35] and did not subject the plaintiff to public ridicule, hatred, or contempt.[36] Arguing the words were not libelous per se, defendant asked for dismissal because no special damages were alleged by plaintiff.

On motion by defendant, the District Judge dismissed the action for failure to state a claim,[37] finding that the allegedly defamatory letter was not libelous per se, and in absence of an allegation of special damages, the complaint was insufficient.

On appeal, the New Mexico Court of Appeals reversed. The decision by the Court of Appeals was based on conventional grounds;[38] finding that the language of the letter contained matter defamatory and of a prejudicial nature to Reed in relation to his business,[39] and that it did so without resort to innuendo.[40] Judge Oman (dissenting)[41] was unable to agree with the majority opinion because of his understanding of the meaning of libel per se as set forth in the decisions of the Supreme Court of New Mexico. Also, Judge Oman urged the New Mexico Supreme Court to re-examine the validity of the libel per se-per quod distinction.

Defendant Melnick then petitioned the New Mexico Supreme Court for a writ of certiorari. Noting the previous suggestions for a

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refund to F.L.W. Reed (agent of record) as in this community people cannot get money out of him.

I don't even want to rely on getting his return commission back from him as he is threatening backruptcy [sic] and my client wants his full refund since he no longer owns property.

34. Under the rules formulated in Dillard and Chase, if the defamatory words were not libelous on their face, the defamation was classified as libel per quod, and special damages were required.

35. The *innocent meaning rule*, as adopted in Dillard and Chase.

36. *See* Chase, 53 N.M. 145, 148, 203 P.2d 594, 595 (1949).

37. Pursuant to N.M.R. Civ. P. 12(b)(6) [N.M. Stat. Ann. § 21-1-1(12)(b)(6) (Supp. 1967)].

38. The court did not ostensibly disregard or reconsider the rules of defamation set forth in previous New Mexico decisions, but based its decision on language cited from Chase, Dillard, Thomas v. Frost, and Ramsey v. Ziegner, 79 N.M. 457, 444 P.2d 968 (1968).

39. 81 N.M. 14, 16, 462 P.2d 148, 150 (1970).

40. *Id.*

41. *Id.* at 16, 462 P.2d at 150-51 (1970).

re-examination of the libel per se-per quod distinction,[42] and because it felt "the matter involved a substantial amount of public interest,"[43] the New Mexico Supreme Court granted certiorari. On certiorari, *held*—new rules concerning libel were laid out and the case was remanded for trial.

IV
HOLDINGS IN REED v. MELNICK

The New Mexico Supreme Court abandoned the rules strictly requiring proof of special damages in all libel actions where the defamatory words were not libelous on their face.[44] Adopted was § 569 of the Restatement of Torts (1938), together with the amendment passed at the 1966 meeting of the American Law Institute:[45]

> One who falsely and without a privilege to do so published matter defamatory to another in such manner as to make the publication a libel, is liable to the other although no special harm or loss of reputation results therefrom; provided, however, that where the defamatory character of the writing can only be shown by reference to extrinsic facts the plaintiff must plead and prove either: (1) that the publisher knew or should have known of the extrinsic facts which were necessary to make the statement defamatory in its innuendo; or (2) special damages.[46]

The Supreme Court also quoted Wisconsin authority in *Martin v. Outboard Marine Corp.*[47] which dealt with the Wisconsin treatment of defamation which could be interpreted in either a defamatory or a non-defamatory sense.[48] The New Mexico court then agreed with Wisconsin, and reaffirmed the New Mexico innocent meaning rule.[49]

V
THE AMENDED § 569 OF THE RESTATEMENT OF TORTS

To predict the effects of the amended § 569 of the Restatement of Torts, care must be taken to analyze the reasoning behind its adoption—both by the American Law Institute[50] and the New Mexico Supreme Court. Each body was faced with two primary con-

42. In McGaw and Thomas v. Frost.
43. Reed v. Melnick, 81 N.M. 608, 609, 471 P.2d 178, 179 (1970).
44. Known generally as latent libel, or sometimes as libel per quod.
45. Hereinafter cited as § 569 amended. *See* 43 ALI Proceedings 460 (1966).
46. 81 N.M. 608, 610, 471 P.2d 178, 180 (1970).
47. Martin v. Outboard Marine Corp., 15 Wis. 2d 452, 113 N.W.2d 135 (1962).
48. *See* notes 103 to 107 *infra*, and accompanying text.
49. 81 N.M. 608, 612, 471 P.2d 178, 182 (1970).
50. ALI Proceedings, *supra* note 45, at 431-60, contains various arguments, *pro and con* concerning the adoption of § 569 amended.

cerns: (1) the duty to protect the private citizen from defamation, both deliberate and unintentional; and (2) the wish to protect innocent parties who, because of a trivial mistake or an unexpected extrinsic fact, find themselves defendants in libel suits, potentially liable for a large sum of money.

The American Law Institute recognized those concerns in their discussion on the *Tentative Draft No. 12 of Torts Restatement, Second,* in 1966.[51] Espousing retention of § 569, *Restatement of Torts,*[52] was Mr. Laurence H. Eldredge.[53] Dean William L. Prosser[54] advocated the ratification of the proposed § 569 of the Restatement of Torts, Second.[55] After lengthy debate,[56] Dean John W. Wade of Vanderbuilt introduced[57] a proposal[58] taking middle ground be-

51. *See* ALI Proceedings, *id.*

52. Restatement of Torts § 569, at 165 (1938):

> One who falsely, and without a privilege to do so, publishes matter defamatory to another in such a manner as to make the publication a libel, is liable to the other although no special harm or loss of reputation results therefrom.

53. Mr. Eldredge is a member of the Pennsylvania Bar Association; former chairman of the Board of Governors, Philadelphia Bar Association; and Advisor and former Revising Reporter for Torts for the American Law Institute.

54. Dean Prosser was the Present Reporter for Torts for the American Law Institute.

55. Restatement (Second) of Torts § 569 (Tent. Draft No. 11, 1965):

> (1) One who publishes defamatory matter is subject to liability without proof of special harm or loss of reputation if the defamation is
>
> (a) Libel whose defamatory innuendo is apparent from the publication itself without reference to extrinsic facts by way of inducement, or
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> (b) Libel or slander which imputes to another
>
> (i) A criminal offense . . .
>
> (ii) A loathsome disease . . .
>
> (iii) Matter incompatible with his business, trade, profession or office . . .
>
> (iv) Unchastity on the part of a woman . . .
>
> (2) One who publishes any other defamation is subject to liability only upon proof of special harm . . .

56. *See* Eldredge, *The Spurious Rule of Libel Per Quod,* 79 Harv. L. Rev. 733 (1966), and Prosser, *More Libel Per Quod,* 79 Harv. L. Rev. 1629 (1966), for previews of this debate.

57. *Stating:*

> I think both Mr. Prosser and Mr. Eldredge will agree that his rule can create injustice. The rules of the old Restatement, which Mr. Eldredge wants us to keep, would mean that a man who is completely innocent, who does not know anything about extrinsic facts that happen to exist, will be held liable strictly and without any need of proving any actual damage. On the other hand, the rule that Mr. Prosser is promoting takes just the opposite position and allows a man who does intend to defame and who knows what he is about, to arrange it in such fashion that he makes the defamatory statement not defamatory on its face, but people who know about the circumstances can understand the defamatory situation.

ALI Proceedings, *supra* note 45, at 447.

58. This proposal recommended retention of § 569 of the Restatement of Torts (1938), but adding at the end: "unless he knew or should have known the extrinsic facts necessary to make the publication actionable."

tween the rules advocated by Mr. Eldredge and Dean Prosser. That proposal was adopted by the A. L. I. and subsequently by the New Mexico Supreme Court in *Reed v. Melnick.*[59]

As stated by Dean Wade,[60] the position argued by Mr. Eldredge seemed to emphasize the first concern—that of protecting[61] the citizen from both patent and latent defamation, even if no special damages could be proven. Dean Prosser's proposal would act to protect the individual from: (1) all patent defamation; and (2) latent defamation if special damages could be proven or if the latent defamation fell into one or more arbitrary[62] categories. Dean Wade's proposal acts to protect the citizen from patent defamation, but in situations involving latent defamation, acts to protect the individual citizen only if special damages can be proven, or if the defamer knew or should have known of the certain facts extrinsic to the publication.

The desire to protect the innocent defamer who publishes matter non-defamatory on its face was of paramount importance in the adoption of the amended § 569 of the Restatement of Torts by both the A. L. I. and the Supreme Court of New Mexico. Traditionally, however, the law of libel[63] has taken a "publish at your peril" approach[64] to defamers, enforcing strict liability regardless of intention[65] or negligence.[66]

The American Law Institute explained its divergence from the traditional rules by arguing that they were simply reflecting what the courts of the land were holding but not saying.[67] In *Reed,* the New Mexico Supreme Court stated:

> The press in this state should have the same protection from its innocent mistakes as that afforded the visual and sound broadcasters who are held free of liability for theirs "unless it shall be alleged and proved by the complaining party that such owner, licensee, operator

59. 81 N.M. 608, 471 P.2d 178, 180 (1970).

60. *See* note 57 *supra.*

61. At this point, we may ask ourselves, how can you "protect" one who has already been defamed? The answer is that defamation is primarily injurious to the reputation, and in many instances the only way a tainted or ruined reputation may be cleared is through the successful maintenance of a slander or libel action. Thus, one may "protect" his reputation by vindicating it in court.

62. The same categories enumerated by the common law courts during the sixteenth century as applicable to slander per se. *See* notes 7 and 8 *supra,* and accompanying text.

63. *See* Henn, *supra* note 11, for a review of judicial treatment of non-fault liability in defamation.

64. *Id.* at 46 n.148.

65. Prosser, *supra* note 6, at 791.

66. *Id.*

67. *See* ALI Proceedings, *supra* note 45, at 448.

> or such agent or employee has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast."[68]

From that statement, we are led to believe that the legislature has seen fit to protect from liability, broadcasting personnel who innocently or non-negligently transmit defamatory material.

By examining N.M. Stat. Ann. § 40-27-35 (Repl. 1964) in its entirety,[69] however, we find that owners, agents and operators of such broadcasting stations are exempted from liability *only when the defamatory statements are uttered by one other than the owner, agent or operator* of such station. The protection extended by the legislature does *not* protect such persons from liability stemming from their *own* statements, no matter how innocent, well-meaning or careful those persons may be. Likewise, the statute does not purport to exempt from liability a manager of a broadcasting station whose announcer-agent has innocently broadcast a defamatory statement.

The desire to protect the innocent defamer who publishes matter non-defamatory on its face is also reflected in several arguments[70] voiced against the common law rule: (1) Adoption of the common law rule might result in a plaintiff being awarded excessive damages for a trivial complaint; (2) the courts might be deluged by a rash of petty spite suits which would overcrowd already crowded dockets; (3) that adoption of the common law rule might expose the press to unscrupulous use of the threat of libel actions as a form of extortion;[71] and (4) freedom of the press and the right of fair comment might be adversely affected by the adoption of the common law rule.[72]

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68. 81 N.M. 608, 610, 471 P.2d 178, 180, *quoting* N.M. Stat. Ann. § 40-27-35 (Repl. 1964).

69. Defamation by radio and television–Liability of owner, licensee or operator–Compliance with federal law.–The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, by one *other* than such owner, licensee or operator, or agent or employee thereof, unless it shall be alleged and proved by the complaining party, that such owner, licensee, operator or such agent or employee, has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast. Provided, however, the exercise of due care shall be construed to include a bona fide compliance with any federal law, or the regulation of any federal regulatory agency, including those laws and regulations fixing the rates that may be charged for use of such facilities for visual or sound broadcasts.

70. *See* Prosser, *supra* note 6, at 783-85. *See also* Thayer, Legal Control of the Press 211 (4th ed. 1962), and Chaffee, Government and Mass Communications 104 (1947).

71. *See* Stewart, Trial Strategy 22-3 (1940).

72. *See* Berney, *Libel and the First Amendment–A New Constitutional Privilege*, 51 Va. L. Rev. 1 (1965); Noel, *Defamation of Public Officers and Candidates*, 49 Colum. L. Rev. 875 (1949); and Bertelsman, *The First Amendment and Protection of Reputation and*

It does appear that argument (1) is sometimes well taken. If the "deep pocket" theory of damages is accepted, the likelihood of abuse[73] is great if a large and wealthy publisher were sued. Responsible authority,[74] however, indicates that if it is felt that a plaintiff might be unjustly enriched by awarding him excessive damages, a remittitur would be in order, rather than a dismissal.[75] Often, a plaintiff files suit with at least the ulterior objective of repairing his injured reputation. By allowing a remittitur of excessive awards of damages, a mitigation of damages for retraction,[76] and by allowing at least nominal damages to be awarded, a court could serve both the interest of fair play to the innocent defendant[77] and the desire of the plaintiff to redeem his lost reputation.[78] Another possible solution to this problem would be for the court to enter a declaratory judgement vindicating the reputation of one defamed falsely, though in good faith, on a "matter of public concern."[79] A court might even require a defending publisher to publish the judgment of the court vindicating the plaintiff and enforce its order with the sanction of contempt.[80]

That an adoption of the common law rule concerning libel would result in a deluge of petty spite suits may be refuted by an examination of jurisdictions which abide by the common law rule. There has

Privacy—New York Times Co. v. Sullivan and How It Grew, 56 Ken. L.J. 718, for comprehensive discussions of the right (or privilege) of fair comment.

73. In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), for example, the Alabama courts inflicted damages of half a million dollars on a locally unpopular Northern newspaper.

74. *See* Newell *On Libel and Slander* § 723 (4th ed. 1924). *See also* Reed v. Melnick, 81 N.M. 608, 610, 471 P.2d 178, 180 (1970), where the court stated: "If prejudiced juries are prone to award large verdicts against publishers, the better rule would correct this by proper instruction or the remittitur of excessive judgements, rather than depriving the injured person of his cause of action."

75. Provisions for the alteration of judgements are found in N.M.R. Civ. P. 59(a) and (e) [N.M. Stat. Ann. § 21-1-1(59)(a) and (e) (Supp. 1969)].

76. Many states have enacted statutes providing for the mitigation of general damages if the defendant publicly retracts his defamatory statement upon demand of the plaintiff. *See for example* Ore. Rev. Stat. § 30.160 (1967), and Cal. Civ. Code § 48(a) (West 1954).

77. For the defendant would then not be exposed to excessive verdicts.

78. Nominal damages might help the defendant defray legal expenses. *See* Newell, *supra* note 74, § 723.

79. Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation,* 49 Cornell L.Q. 581, 604. In Note, *An Alternative to the General-Damage Award for Defamation,* 20 Stan. L. Rev. 504, 530-36 (1968), a statute is proposed which would provide for the mandatory publication of a retraction notice by the offending publisher, or for free publication of a reply from the defamed individual. This solution would also tend to serve the interest of fair play to the publisher and the plaintiff's interest in vindicating his reputation. This proposal, however, makes no provision for the compensation of the plaintiff's pecuniary losses which may well have occurred during the interim between the original publication of the defamation and the publication of the retraction or reply.

80. This is the practice in several foreign countries. *See* Pedrick, *Id.* 604 n.778.

been no indication of this problem in England or in the several states[81] which have adopted the common law rule. Likewise in Washington[82] and Louisiana[83] no proof of special damages in libel *or* slander actions is required. Even Prosser agrees that this objection cannot be substantiated by an examination of jurisdictions which have adopted the common law rule.[84]

The fear that extortion of the press results from liberal application of the common law rule of libel is noted by several authorities.[85] Even though assessment of court costs to unsuccessful plaintiffs,[86] ethical standards of the legal profession,[87] and general reluctance of the bar to prosecute libel actions[88] all operate to discourage such threats of extortion, the fact that the cost of the defense in a libel action can be prohibitive, tends to sustain such threats.[89] If large publishers, however, do tend to resist such threats of extortion and prefer to "no longer settle out of court, but fight,"[90] the abuse of extortion may be negated to some extent. Prosser suggests that the publishers could be better protected by adoption of the requirement of proof of actual damages as essential to the existence of any cause of action involving libel.[91] He then dismisses that alternative, "because it is clear that proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of that publication, it is all but certain that serious harm has resulted in fact."[92]

The contention that substantial damage might be done to our traditional right of freedom of the press by making publishers pay damages without proof of injuries has been raised by certain authorities.[93] In *New York Times Co. v. Sullivan,*[94] the court stated: "[a]

81. Mr. Eldredge lists the states of Delaware, Georgia, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Texas, Washington and Wisconsin as following the common law rule as embodied in Restatement of Torts § 569 (1938). Eldredge, *supra* note 56, 747-48.

82. *See* Fitzgerald v. Hopkins, 70 Wash. 2d 924, 425 P.2d 920 (1967).

83. *See* La. Civ. Code Ann. art. 2315 (West 1952), and Upton v. Times-Democrat Pub. Co., 104 La. 141, 28 So. 970 (1900).

84. Prosser, *supra* note 6, at 782-85.

85. *See* Stewart, *supra* note 71, at 22-23, and Hayes, *Book Review,* 58 Harv. L. Rev. 881, 883-84 (1945).

86. Berney, *supra* note 72, 34 n. 175.

87. *Id.*

88. *Id.*

89. *Id.* In one example cited, the Chicago Tribune's defense cost was $303,968.72 for a suit in which it "suffered" a verdict of six cents.

90. *Id. See also* Chaffee, *supra* note 70, at 104.

91. Prosser, *supra* note 6, at 783.

92. *Id.*

93. *See for example* Prosser, *supra* note 56, at 1647.

94. 376 U.S. 254 (1964).

rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgements virtually unlimited in amount"[95] is equivalent to censorship. Certainly we must consider the desirability of free and open discussion of every matter of public concern or general interest.[96] On the other hand, however, we must reconcile the interest of free and open discussion with the individual citizen's interest in reputation and privacy. This "balancing of interests"[97] has of late, been achieved by the legal evolution of certain limitations which reduce the strict liability for defamation.[98] Those limitations come in various forms: truth, privileges, rights of fair comment, etc.—all serve the interest of protecting the publisher, while providing the public with newsworthy information. Criticism of public officers and organizations, as well as subjects of scientific, artistic, literary and domestic interest is now privileged[99] as "fair comment."[100] Professor Berney[101] suggests that the protection now given publishers is adequate, and should not be extended past matters of public concern—*i.e.* there is no reason to prefer the interest in free expression over the interest of the individual citizen in "self esteem, privacy or reputation."[102] If this view is followed, the more narrow defense of privilege is to be preferred over a rule which might leave a private citizen no legal remedy to defend his reputation.

VI
THE INNOCENT MEANING RULE

In addition to adopting the amended § 569 of the Restatement of Torts, the New Mexico Supreme Court quoted a portion of the decision of the Supreme Court of Wisconsin in *Martin v. Outboard Marine Corp.:*

95. *Id.* at 279.

96. *See* Berney, *supra* note 72, at 39-48, and Nutting, *Is the First Amendment Obsolete?*, 30 Geo. Wash. L. Rev. 167-73 (1961).

97. *See* Berney, *id.*

98. *See* Spiegal, *Defamation by Implication—In the Confidential Manner,* 29 S. Cal. L. Rev. 306, 317 (1956).

99. Restatement of Torts § 607-09 (1938), and Spiegal, *id.*, at 320. *See generally* Berney, *supra* note 72; Noel, *supra* note 72; Bertelsman, *supra* note 72; and Pedrick, *supra* note 79.

100. Fair comment has been described as "[m]ere expressions of opinion or severe criticism. . ." going "only to the merits or demerits of a condition, cause or controversy which is under public scrutiny. . ." Howard v. Southern Calif. Associated Newspapers, 95 Cal. App. 2d 580, 584, 213 P.2d 399, 403 (1950). *See* New York Times Co. v. Sullivan, however, where the court extended this privilege, holding a public official could not recover damages resulting from publication unless actual malice, or a reckless disregard for the truth is shown.

101. Berney, *supra* note 72, at 45-47.

102. *Id.*, at 45.

> If the publication is capable of a defamatory meaning and in the form of libel, it is actionable without an allegation of special damages; if in the form of slander not constituting one of the four arbitrary categories, it is not actionable without an allegation of special damages. After proof is in, the court may decide the communication is subject to one or more meanings, one being defamatory and the other innocent, or all defamatory. If the only possible meaning or meanings of the communication under all the facts in the case are defamatory as applied to the plaintiff and could only be reasonably so understood by the recipient, the court may hold the language defamatory as a matter of law and there is no question to go to the jury. If the court determines the communication is capable of an innocent meaning as well as a defamatory meaning, it is then for the jury to determine whether the communication capable of a defamatory meaning was so understood by its recipient. It is misleading to state on demurer that the alleged libel, whether on its face or by reason of extrinsic circumstances is libelous per se when all that is then decided is that the alleged publication is capable of a defamatory meaning.[103]

Immediately following that quotation, the New Mexico Court stated:

> We agree with the Wisconsin court. We reaffirm the innocent meaning rule as first set forth in *Dillard v. Shattuck, supra,* as applicable to both libel and slander. There, we said a defamatory character will not be given the words "unless this is their plain and obvious import," and that language will "receive an innocent interpretation where fairly susceptable to it."[104]

Here, the court purports to "agree" with the Wisconsin statement which holds *all libel* actionable without proof of special damages. The Wisonsin rule also provides that the judge may rule on whether the communication was capable of conveying a defamatory meaning.[105] If the judge finds that the communication was incapable of any defamatory interpretation, the action will be dismissed.[106] If the alleged communication is capable of both a defamatory and non-defamatory meaning, a jury question is presented[107] as to whether such communication was in fact interpreted in its defamatory sense

103. Reed v. Melnick, 81 N.M. 608 at 612, 471 P.2d 178 at 182 (1970), *quoting* Martin v. Outboard Marine Corp., 15 Wisc. 2d 452, 457, 113 N.W. 2d 135, 140 (1962).

104. 81 N.M. 608, 612, 471 P.2d 178, 182 (1970).

105. *See* Wozniak v. Local 1111 of the United Electrical Workers of America, 45 Wis. 2d 588, 592, 173 N.W.2d 596, 598 (1970) and Frinzi v. Hanson, 30 Wis. 2d 271, 276, 140 N.W.2d 259, 261 (1966).

106. *Id.*

107. As a question of fact. The jury is allowed to take into account:
(1) "the circumstances"; (2) the "context" of the publication; and (3) the "recipients" to decide if the publication was actually interpreted in its

by a recipient. If the jury finds that no one did so understand the communication in its defamatory sense, no action may be sustained, for the plaintiff could not be damaged.

After "agreeing" with the Wisconsin statement, the court in *Reed* reaffirmed the New Mexico innocent meaning rule, which, as stated in *Dillard v. Shattuck*[108] "is but another way of saying that, where a per se slanderous[109] character is sought to be impressed upon the claimed defamatory words, they will not be given such meaning unless that is their plain and obvious import." Under the *Dillard* rule, if a publication is capable of both a defamatory and a non-defamatory interpretation, it "will receive an innocent interpretation," and cannot be treated as libel per se.[110]

The reaffirmation of the innocent meaning rule as stated in *Dillard* is inconsistent with the Wisconsin rule. Under the Wisconsin rule, if a statement is subject to various defamatory and non-defamatory interpretations, the jury would decide if the statement was in fact understood in its defamatory sense. Under the *Dillard* rule, a communication containing a defamatory innuendo which was not its plain and obvious import, but which was in fact understood in its libelous connotation, would not be considered actionable without proof of special damages. Perhaps the New Mexico decision reflects the feeling that if the defamatory connotation of an utterance is not its "plain and obvious import," the publisher could not and should not have known of the extrinsic facts needed to make the statement defamatory in its innuendo. However, the *Dillard* rule was not limited in *Reed* to communications requiring extrinsic facts to prove the defamatory character of the writing.

By reaffirming the "innocent meaning rule as first set out in *Dillard,*" does the New Mexico Supreme Court intend to continue the per se-per quod distinction as outlined in *Dillard, Del Rico, Thomas* and *McGaw?*[111] Hopefully not, for the reaffirmation of the per se-per quod distinction of the innocent meaning rule would serve to negate the desired reform sought by the adoption of the amended § 569 of the Restatement of Torts. Also, the reaffirmation of the *Dillard* rule conflicts with the well-written decision of the Wisconsin Court in *Martin v. Outboard Marine Corp.* which was quoted in *Reed.*

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defamatory sense. Martin v. Outboard Marine Corp., 15 Wis. 2d 452, 457, 113 N.W.2d 135, 140-141 (1962).

108. 36 N.M. 202, 206, 11 P.2d 543 at 546 (1932).

109. Or libelous, for in Reed, the court holds Dillard's rule as applicable to both slander and libel.

110. 36 N.M. 202, 206, 11 P.2d 543, 546 (1932).

111. *See* note 19 *supra* and accompanying text.

VII
CONCLUSION

The adoption of the amended § 569 of the Restatement of Torts provided a significant attempt to reform the harsh and complex libel laws of New Mexico. However, the extent of the reform was not as great as could have been effectuated by a return to the common law rules of libel as outlined in Restatement of Torts § 569 (1938).

In certain instances, it is still possible for a citizen to be defamed in New Mexico and be prevented from seeking legal means to clear his name–simply because he cannot place a specific money value on the loss of his reputation. The court in *Reed*[112] agreed that the relationship between the damage to one's reputation and his pecuniary loss is tenuous at best, but the court still requires proof of special damages in order to protect the "innocent" defamer. When measuring fault, however, can the publisher ever be as innocent as the hapless person he has defamed?

The reaffirmation of the innocent meaning rule serves to limit much of the reform effectuated by the adoption of the amended § 569 of the Restatement of Torts. The reaffirmation of the innocent meaning rule also tends to perpetuate the confusion which has been inherent in the decisions reflecting New Mexico's rules of libel for several decades. For these reasons, the New Mexico Supreme Court is urged to make a fresh appraisal of the application of the innocent meaning rule to the amended § 569 of the Restatement of Torts.

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112. *Asking:* "what is the money value of one's reputation, even when related to a business or profession?"; and *stating*: "It may be that we are requiring the plaintiff to 'measure the unmeasurable'." 81 N.M. 608, 610, 471 P.2d 170, 180 (1970), *quoting* Comment, *supra* note 16, at 604.