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Torts—Libel and Slander—The Libel Per Se-Libel Per Quod Distinction in New Mexico

Rodric B. Schoen

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TORTS—LIBEL AND SLANDER—THE LIBEL PER SE-LIBEL PER QUOD DISTINCTION IN NEW MEXICO*—Referring to libel per se, the peculiar American modification of libel, Professor Carpenter warned "it is a new creature... ugly and illegitimate and ought promptly to be strangled."1 New Mexico defamation decisions indicate that the supreme court has adopted a strict doctrine of libel per se and its corollary, libel per quod.2 Plaintiffs in New Mexico are unable to recover for the relational tort of defamation unless harsh, inflexible, and nearly insurmountable rules of law are overcome.

The distinction between written and oral defamation—i.e., between libel and slander—is recognized in England4 and in all American jurisdictions, with possibly two exceptions.5 Although the distinction between libel and slander has been subjected to much

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1. Carpenter, Libel Per Se in California and Some Other States, 17 So. Cal. L. Rev. 347 (1944). Unfortunately, New Mexico was not among the "other states" surveyed.
2. "Libel, or libelous, per se" first appears in a New Mexico decision in Colbert v. Journal Publishing Co., 19 N.M. 156, 142 Pac. 146 (1914); "libel, or libelous, per quod" first appears in Chase v. New Mexico Publishing Co., 53 N.M. 145, 203 P.2d 594 (1949).
3. A libel or slander action is a way of protecting reputation against defamatory words. See Green, Relational Interests, 31 Ill. L. Rev. 35 (1936); Restatement, Torts § 539, and comments (1938).

That damage to reputation is asserted and measured in dollars seems no more destructive to the relational or non-pecuniary theory of the action than is the necessity of dollar compensation for suffering and mental distress in other tort actions; there is no practical alternative in a civil action. See Note, 13 Vand. L. Rev. 730, 732 n.15 (1960), for a collection of commentators' views on both the relational and pecuniary theory of a defamation action.

4. See Thorley v. Kerry, 4 Taunt. 355, 128 Eng. Rep. 367 (1812), in which Lord Mansfield, though he disliked the libel-slander distinction and was tempted to repudiate it, decided the rule was too well established by precedent to overturn.

5. In Grein v. La Poma, 54 Wash. 2d 844, 340 P.2d 766 (1959), the court abolished the distinction between libel and slander but failed to indicate which distinctive form would be assimilated by the other. This bold holding may be nothing more than dictum, for the court held that, in any event, it was slanderous per se to call another a Communist and a showing of special damages would not be required.


criticism, it appears the union of the two into the single tort of defamation is to be delayed until the time that lawyers, judges, and scholars can decide which is to be assimilated to the other, or whether some new action should be devised.

As the common law in England developed, all libel, whether libelous on its face or libelous by application of extrinsic matter to innocent words through the pleading devices of innuendo, inducement, or colloquium, was actionable per se, i.e., no actual or special damages were necessary as such damage was presumed because of the gravity of libel. The writing was either defamatory or it was not, there being no special labels applied to words libelous on their face or shown to be libelous by pleading extrinsic matter or innuendo.

Slander was subject to different rules. Slander was not actionable per se and pecuniary damages were necessary before recovery was possible.

6. Of all the odd pieces of bric-a-brac upon exhibition in the ... common law ... one of the oddest is the distinction between ... libel and slander. ... Arising out of old and long forgotten jurisdictional conflicts ... it remains a senseless thing. ... Prosser, supra note 5, at 839. See also Prosser, Torts § 107, pp. 769-72 (3d ed. 1964), for modern-day problems resulting from the libel-slander distinction.


8. In framing a declaration for defamation, when the defamatory meaning of the communication or its applicability to the plaintiff depends upon extrinsic circumstances, the pleader avers their existence in a prefatory statement called the 'inducement.' In what is ordinarily called the 'colloquium' he alleges that the publication was made of and concerning the plaintiff and of and concerning the extrinsic circumstances. The communication he sets forth verbatim and the 'innuendo' explains the meaning of the words. The function of the innuendo is explanation; it cannot change or enlarge the sense or meaning of the words. It can only explain or apply them in the light of other averments in the declaration. Restatement, Torts § 563, comment f (1938). See also Henn, Libel-By-Extrinsic-Fact, 47 Cornell L. Q. 14, 19-22 (1961), for a more detailed account of these words, their meaning, and application.

9. Written defamation was more serious than oral defamation for this reason, usually given by the courts in the following terms:

Written slander, by reason of its wider circulation and enduring form, is calculated to inflict great permanent injury to character and suggests stronger malice by reason of its studied preparation.


The libel-slander distinction did give rise to anomalous situations when oral defamation would not permit recovery without proof of actual damages, but the same words, if written, would permit recovery upon the presumptive-damage theory of libel without proof of pecuniary damage. See 1 Harper & James, Torts § 5.9 (1956).

10. See Henn, supra note 8, at 16-19, for an exceptionally clear discussion of the libel-slander distinction related to their treatment by common law.

allowed. An exception arose to this requirement; certain slanderous words became actionable per se, as was all libel. Words imputing the commission of an indictable crime, the presence of a loathsome disease, imputing want of chastity in a woman, or imputing that one was unfit to follow his business or occupation, all became actionable per se. Oral defamation in these categories came to be known as slander per se. Slander per se meant that the presumptive-damage doctrine prevailing for all libel would apply to only the actionable per se categories of slander. Slander per se did not mean that the slanderous impact had to be apparent from the words alone; slander could be shown through pleading of extrinsic matter or innuendo.

At common law, then, all libel was actionable per se without proof of special damages; all slander required proof of actual damages, except the slander per se categories. Apparently the words “per quod” crept into the law of libel from slander actions in which the allegation of actual damages was introduced by these words.

In a majority of American jurisdictions, libel is now considered to have two forms: (1) libel per se, meaning that the defamatory impact is plainly apparent from the words themselves; and (2) libel per quod (sometimes called libel by extrinsic fact), meaning that

12. Ibid.
14. See Henn, supra note 8, at 17.
16. Dean Prosser indicates that the following jurisdictions adhere without apparent qualification to the traditional theory of libel: Delaware, Iowa, Minnesota, Mississippi, New Jersey, and Wisconsin. Texas follows the common-law rule by statute, and New York decisions are in conflict. Prosser, op. cit. supra note 7, § 107, pp. 780-81.
17. See Henn, supra note 8, at 22. Professor Carpenter, supra note 15, at 353, prefers the more intriguing term “covert defamation.” Strictly, there is a difference between libel shown by application of extrinsic facts or by the use of innuendo (including inducement and colloquium), but few courts have made the exact distinction because often both are required to show the defamation. For example, a libel consisting of the phrase

Miss X.Y. is employed at 27 Willow Street

would require Miss X.Y. to plead the extrinsic fact that 27 Willow Street is a brothel, in addition to disputing the falseness of the assertion that she is employed there.

The phrase

A young lady, who recently moved here from Chicago, has been seen at 27 Willow Street

would require the plaintiff, in addition to disputing the falseness of the assertion that she had “been seen” at 27 Willow Street, to show the extrinsic fact that it was also a brothel. She would be required to show the statement referred to her because she had, in fact, recently arrived from Chicago, and that the words “has been seen” convey the meaning
an additional pleading of special damages is required if the defama-
tory impact is shown by resort to extrinsic matter or innuendo.\textsuperscript{18}

This distortion\textsuperscript{19} of the common-law concept of libel has no his-
toric foundation, except perhaps in the distinction between libel and slander and recognition of the slander per se categories. Nothing in the history of the common law appears to have forced judicial adoption of the rule that the plaintiff is required to allege and prove special damages if the defamation can be shown only by extrinsic matter. Libel is libel by whatever means it is shown. Is not the pro-

that she is a prostitute rather than being at 27 Willow in some innocent role. The defamatory impact of the publication would then be shown.

The illustrations reveal the difficulty of separating extrinsic fact from innuendo in showing the defamatory meaning of the publication. To a stranger unacquainted with the extrinsic facts, the words appear completely innocent.

\begin{itemize}
  \item \textsuperscript{19} Speaking of the libel per se-libel per quod breakdown, Dean Prosser says:
    \begin{quote}
      \textquote[This American departure from the established English rule has been due to nothing more than an incompetent confusion on the part of the courts as to the two meanings of libel or slander \textquote[\textit{per se}]. These words have been used more or less indiscriminately to signify both publications which in themselves convey a defamatory meaning . . . and those which in themselves are necessarily damaging . . . as in the case of the four exceptional kinds of slander. When the one meaning becomes entangled with the other, the result is that libel which is not defamatory upon its face is held to be not damaging in itself, and so is treated like slander.}
    \end{quote}
\end{itemize}

Prosser, supra note 5, at 848-49.

It appears that American courts began to equate libel per quod with actions on the case for injurious falsehood or disparagement. These actions on the case are not historically a form of defamation. Non-defamatory words, though possibly irksome, annoying, and in bad taste, cannot be made defamatory by showing special damages. See Del Rico Co. v. New Mexican, Inc., 56 N.M. 538, 551, 246 P.2d 206, 214 (1952), in which the plaintiff, failing to convince the supreme court that the words sued upon were libelous per se or per quod, attempted an eleventh-hour reliance on the injurious falsehood or disparagement theory. See also Carpenter, supra note 15, at 553-54, discussing Shaw Cleaners & Dyers, Inc. v. Des Moines Dress Club, 215 Iowa 1130, 245 N.W. 231 (1932).

A confusion among American scholars and commentators in the terminology of defamation seems to have played a part in the American modification of the law of libel. For example, see Note, 13 Vand. L. Rev. 730, 732-34 (1960), discussing Townshend's treatise on defamation [\textit{[Townshend, Libel and Slander (3d ed. 1877)]]]. Townshend mixed actionable per se with libel per se and said that special damages were required if the publication was not libelous per se. He was apparently thinking of slander per se. Townshend made no distinction between a publication libelous on its face or shown to be libelous by extrinsic matter or innuendo. Thus, the term \textit{per se} was a superfluous addition to \textit{libel} to indicate that all libel was still actionable without a showing of special damages.

\begin{itemize}
  \item \textsuperscript{[T]he general rule of libel is that all libelous matter is actionable without allegation and proof of special damage \textquote[\textquote{actionable \textquote{per se}}] . . . [L]ibel is \textquote{libel} without any \textquote{per se}—\textquote{per quod} breakdown. The phrase \textquote{libel \textquote{per se}} . . . is tautological; the term \textquote{libel \textquote{per quod} is self-contradictory.}
\end{itemize}

Henn, supra note 18, at 18.
tection accorded reputation under the law vitiated when the plaintiff is compelled to measure the unmeasurable in actual damages?  

In *Hoeck v. Tiedebohl*,\(^2\) decided in 1964, the alleged libel had been published in a column in a local shopper's paper mailed to 3400 addressees in Bernalillo County.\(^2\) The words, in the elliptical, quasi-confidential style affected by such columns, were:

... [Plaintiff] (Marge White of KOB-TV) off on a six month jaunt... true story: persuaded to take a charm course by employers as standard procedure... is knitting little things as she and her husband expect an addition to an already half-grown family...\(^2\)

The plaintiff, a television personality in Albuquerque, was not at the time of publication pregnant or married, though she had been married previously; nor had she been required to take a charm course. The defendant maintained the part of the publication referring to the charm course and the knitting of little things was meant to identify another person.\(^2\) The plaintiff alleged that the publication rendered her contemptible and ridiculous in the public estimation and subjected her to scorn, shame, and disgrace.

Assuming the article did not convey a defamatory meaning on its face to anyone not acquainted with the plaintiff's marital status or employment, it can be seen that the plaintiff was compelled to plead the extrinsic facts that she was not married, pregnant, or required to take a charm course. In so doing she was merely pleading the facts necessary to show the false nature of the publication and was not attempting to enlarge or alter its meaning. The article said she was married, expecting a child, and taking a required charm course; her pleading sought to show the defamatory nature of these words.

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20. By the very nature of the harm resulting from defamatory publications, it is frequently not susceptible of objective proof. Libel and slander work their evil in ways that are invidious and subtle.

1 Harper & James, Torts § 5.30 (1956).

21. The extent of harm done by a defamatory publication does not depend upon whether the defamatory character of the words appears on their face, or whether the meaning is covert. If those who understood took the words in a defamatory sense, the disparagement...is the same...

Carpenter, supra note 15, at 353.

22. 391 P.2d 651 (N.M. 1964). Some six months after *Hoeck*, the New Mexico Supreme Court issued its opinion in another libel case, Rockafellow v. New Mexico State Tribune Co., 397 P.2d 303 (N.M. 1964). As the most recent decision, *Rockafellow* indicates no departure from the rules of law followed in *Hoeck*.


24. Record, p. 86.
by revealing the true facts. No special damages were pleaded by the plaintiff, and in a trial to the jury she had verdict and judgment.

Upon appeal, held, Reversed and the trial court instructed to enter judgment for the defendant because the publication was not libelous per se and the plaintiff failed to allege and prove special damages. Were the words libelous per se? This was the sole question presented in the appeal. The supreme court, relying primarily upon two earlier New Mexico libel decisions, used these rules of law to determine the issue: (1) words libelous per se are opprobrious in and of themselves without anything more; (2) to be libelous per se the words must be stripped of all innuendo and explanatory circumstances; (3) the defamatory meaning must be the only one of which the words are susceptible; and (4) the words will be construed as a stranger, lacking any knowledge possessed by the parties, might view them. The court concluded that "without a knowledge of extrinsic facts there is nothing on the face of the article which defames..." [plaintiff].

New Mexico case development prior to Hoeck indicates the supreme court had adopted the following strict rules: If the publication is patently defamatory, the court will take a narrow view of the words; if the publication bears a latent defamatory meaning, special damages must be alleged and proved.

The New Mexico Supreme Court adopted the libel per se-libel

26. Ibid.
29. Ibid.
30. This review is confined to civil actions. The reported New Mexico decisions include two criminal libel cases: State v. Ogden, 20 N.M. 636, 151 Pac. 758 (1915); State v. Elder, 19 N.M. 393, 143 Pac. 482 (1914).
The New Mexico criminal libel statute seems to preserve a more generous position for the state as prosecuting party than the supreme court has accorded plaintiffs in civil actions. In the criminal statute it is enough that the words convey a false meaning, with no mention of extrinsic matter or innuendo, and the statute requires no proof of actual injury to the reputation of the person defamed. N.M. Stat. Ann. §40A-11-1 (Repl. 1964).
31. "Patently" means that the words alone without application of extrinsic matter or innuendo are clearly defamatory.
32. The so-called "innocent-meaning" rule was first announced in Dillard v. Shattuck, 36 N.M. 202, 11 P.2d 543 (1932) (slander), and was reiterated in Del Rico Co. v. New Mexican, Inc., 56 N.M. 538, 246 P.2d 206 (1952) (libel).
33. "Latent" here means that the words are not clearly defamatory in and of themselves; the defamatory meaning is revealed either by explanation or interpretation of the words or by introduction of extrinsic fact.
per quod (patent-latent\textsuperscript{34}) distinction within the tort of libel in \textit{Chase v. New Mexico Publishing Co.},\textsuperscript{35} decided in 1949. The \textit{Chase} decision relied primarily on Oklahoma decisions and made but oblique reference to earlier New Mexico libel decisions recognizing the traditional rules of libel. The earlier cases are: \textit{Colbert v. Journal Publishing Co.}\textsuperscript{36} (1914); \textit{Ward v. Ares}\textsuperscript{37} (1924); and \textit{Wood v. Hannett}\textsuperscript{38} (1930). A slander case, \textit{Dillard v. Shattuck}\textsuperscript{39} (1932), was also cited by the supreme court in \textit{Chase}. No reason is given by the supreme court in \textit{Chase} for abandoning its precedent for that of other jurisdictions.\textsuperscript{40}

The earlier decisions had used, it is true, the redundant phrase "libel per se" since the \textit{Colbert} decision in 1914. In \textit{Colbert} the supreme court had adopted the definition of libel per se used by Judge Cooley in his treatise \textsuperscript{41} on torts, but the court had used this definition consistently in decisions prior to \textit{Chase} to include all libel whether patent or latent. The term "per se" served as a superfluous addition to the word "libel" to indicate that all libel was actionable without alleging and proving special damages. It is clear that Judge Cooley did not distinguish between patent and latent libel in \textit{his} use of the phrase "libel per se."\textsuperscript{42}

In \textit{Colbert} and \textit{Ward} the plaintiffs had relied solely upon the defamatory impact of the words alone without pleading extrinsic mat-

\textsuperscript{34} See notes 31 and 33 supra.
\textsuperscript{35} 53 N.M. 145, 203 P.2d 594 (1949).
\textsuperscript{36} 19 N.M. 156, 142 Pac. 146 (1914).
\textsuperscript{37} 29 N.M. 418, 223 Pac. 766 (1924).
\textsuperscript{38} 35 N.M. 23, 289 Pac. 590 (1930).
\textsuperscript{39} 36 N.M. 202, 11 P.2d 543 (1932).
\textsuperscript{40} The \textit{Chase} decision states no compelling social, legal, or historical purpose for the new rules of law, which suggests a possibility that the supreme court was confused or oblivious of the consequences of its holding.
\textsuperscript{41} Cooley, \textit{Torts §§ 110-13} (student ed. 1907).
\textsuperscript{42} Cooley, \textit{op. cit. supra} note 41, §§ 110-13. Judge Cooley shows an embarrassing tendency to mix libel, slander, and action on the case for injurious falsehood. He says that a libel per se requires no proof of special damages, but other forms of libel do require proof of special damages. The "other forms" of libel are not illustrated, and he later discusses innuendo, inducement, and colloquium, never intimating that defamation shown by these devices requires special damages or is different from libel per se. See also note 19 \textit{supra}. 


\textit{Cooley, op. cit. supra} note 41, §§ 110-13. Judge Cooley shows an embarrassing tendency to mix libel, slander, and action on the case for injurious falsehood. He says that a libel per se requires no proof of special damages, but other forms of libel do require proof of special damages. The "other forms" of libel are not illustrated, and he later discusses innuendo, inducement, and colloquium, never intimating that defamation shown by these devices requires special damages or is different from libel per se. See also note 19 \textit{supra}.
ter or innuendo. It so happened in both cases that the publication was patently defamatory, and in the absence of a pleading of extrinsic matter or innuendo, the court was compelled to judge the words alone. No mention is made in Colbert or Ward of a requirement of special damages in the case of latent libel.

The Wood decision (1930) confounded the traditional doctrine when the court at the outset observed that both the plaintiff and the defendant agreed that if the publication was not libelous per se, special damages must be shown. But the court later acknowledged the role of extrinsic matter or innuendo in defamation and did not exclude a libel shown by those devices from the libel per se definition.

The plaintiff in Wood seems to have equated his libel action with a slander per se category, and the supreme court may possibly have been considering an alternative action on the case for injurious falsehood or disparagement if the plaintiff was not able to prove he had been libeled.

The final defamation action before the Chase decision was Dillard, a slander action, decided some seventeen years before Chase. In Dillard, the plaintiff, an attorney, sought to recover in a slander per se category (imputation of commission of an indictable offense) upon

43. It is conceded by appellant that if the words used are unequivocal and actionable per se, and point with certainty to the person to whom they are intended to apply, it is not necessary to set forth any extrinsic facts to make them actionable.


Nothing was pleaded by way of inducement, colloquium, or innuendo. Since the purpose of pleading and proving innuendo in a libel case is to give point or meaning to matter which is not, of itself, or standing alone, libelous, it naturally follows that in the absence of innuendo the action must necessarily fail, unless the language . . . be libelous per se.


44. E.g., Ward v. Ares, supra note 43, at 421, 223 Pac. at 767.

45. Wood v. Hannett, 35 N.M. 23, 27, 289 Pac. 590, 592 (1930). These concessions by counsel for the plaintiff in New Mexico defamation cases indicate that the supreme court is not wholly responsible for changes in the law of defamation.

46. If the publication . . . has such [libelous] tendency, it is well established that resulting general damages are presumed . . . no special damage need be alleged or proven. If that publication tends to charge appellant with crimes, misdemeanors, and misconduct, as alleged by way of innuendo, in the complaint, it is undoubtedly libelous per se and actionable, though no special pecuniary injury is alleged. But, as appellant admits, the innuendo cannot enlarge or vary the meaning of the publication.

47. See note 46 supra. The plaintiff's admission indicates that he was thinking of a slander per se category.

48. See note 19 supra.
a plea of general damages. The words involved did not patently charge the plaintiff with embezzlement, so he sought to show the latent defamation by an interpretation of how the words were understood by auditors of the oral exchange. The supreme court held that the words would not bear the latent defamatory meaning urged by the plaintiff. The supreme court in Dillard set forth these controlling rules for slander: (1) If the words are not slanderous per se, special damages must be shown; (2) the innuendo is to be ignored in determining whether the words are slanderous per se; (3) in order for the words to be actionable per se they must be capable of but one opprobrious or defamatory meaning; (4) oral defamation is more strictly construed than libel.

It does appear that Dillard adopted the "innocent-meaning" rule for slander, and in Del Rico Co. v. New Mexican, Inc., decided in 1952, the supreme court adopted the innocent-meaning rule for libel.

Defamation decisions prior to Chase indicate that New Mexico, though its terminology was burdened with "libel per se," had followed the orthodox rules of libel. Until 1949, libel per se in New Mexico meant all libel, be it patent or latent. The supreme court had exercised the traditional function of the court in libel actions, determining as a question of law whether or not the publication was capable of a defamatory meaning before submission to the jury for determination of whether or not the defamatory meaning was understood by the recipients of the publication. Until Chase the supreme court held that the words would not bear the latent defamatory meaning urged by the plaintiff.

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50. Id. at 206-07, 11 P.2d at 546.
51. Id. at 204-05, 11 P.2d at 545.
52. The rule restricting the slanderous words by requiring them to be susceptible of but one meaning—opprobrious or defamatory—harks back to the doctrine of mitior sensu used by the English courts during the sixteenth and seventeenth centuries. Although the doctrine was never applied to libel, mitior sensu was the policy of the court to give—or force—an innocent meaning to the allegedly slanderous words whenever possible; some absurd and unjust decisions resulted. The doctrine was used to control the flood of slander actions descending on the civil courts after they had obtained jurisdiction of such actions from the ecclesiastical courts. See Bower, Actionable Defamation 332-35 (1908); Note, 13 Vand. L. Rev. 730, 735 (1960).
53. 56 N.M. 538, 246 P.2d 206 (1952).
54. [T]he statements claimed to be libellous, if such per se, must carry but a single meaning, and it an opprobrious or defamatory one.
55. Restatement, Torts § 614 (1938); see, e.g., John v. Tribune Co., 24 Ill. 2d 437, 181 N.E.2d 105 (1962); Rhodes v. Star Herald Printing Co., 173 Neb. 496, 113 N.W.2d 658 (1962). The New Mexico decisions have never mentioned these traditional roles of judge and jury, but it seems that the roles have been recognized by implication.
court had not adopted a rule requiring a showing of special damages in the case of latent libel.

The *Chase* decision, ignoring for practical purposes the New Mexico precedent, redefined libel per se to mean patent defamation, *i.e.*, a defamatory impact from the words alone without recourse to extrinsic matter or innuendo. If the defamation is not patent, an allegation and proof of special damages is required. This rule is harsh. An additional rule, that the court will resolve ambiguity in favor of the defendant and an innocent meaning in the case of words that may have both an innocent and defamatory meaning, creates an inequitable burden for the New Mexico plaintiff seeking recovery for libel.

In *Chase* the publication sued upon was an editorial critical of the state revenue commissioner, and it included this reference to the plaintiff:

'[
The revenue commissioner's] nice taste shows mainly, though, in his principal hobby. He is a noted collector of steel engravings of past U.S. Presidents, printed in subdued shades on U.S. treasury paper.

'It is said that his judgment and skill in this collection have drawn high expressions of admiration from such connoisseurs of the art as . . . [plaintiff and two others]'.

Additionally, the plaintiff pleaded extrinsic matter by which he sought to show the libelous impact of the instant editorial by referring to earlier publications of the defendant newspaper critical of the plaintiff and apparently charging the two men with whom the plaintiff’s name was linked of misconduct in public office.

The supreme court observed that the parties conceded the complaint, alleging no special damages, to be insufficient unless the publication was libelous per se. After citing the Cooley definition of libel per se used in *Colbert* and *Ward*, the court continued to transform the rules of law pertaining to libel. The *Chase* decision consists

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56. See notes 52 and 54 *supra*. For an example of an early American case using the innocent-meaning doctrine at its most absurd boundary, see Geisler v. Brown, 6 Neb. 254 (1877), in which the court found the publication non-defamatory because it did not say the plaintiff had beaten her step-daughter unmercifully with a large club with wilful intent. An element of the special-damage requirement was also present, for the court observed that the plaintiff had failed to show what pecuniary damages resulted to her because of the publication.


58. See note 45 *supra* and accompanying text.
almost entirely of quotations from defamation decisions of other jurisdictions, primarily Oklahoma:

The term 'per se' means by itself; simply as such; in its own nature without reference to its relation; and in connection with libel, the term is applied to words which are actionable because they . . . without anything more, are opprobrious.\(^{50}\)

* * * *

'In determining whether the words used are slanderous per se, the innuendo is to be disregarded. It can neither add to, nor enlarge, their sense. . . . [I]f the meaning imputed is not their plain and obvious import, the court, in passing upon a demurrer . . . will ignore the innuendo. Newell on Slander and Libel (4th Ed.) §§ 542, 544, 549.'\(^{60}\)

* * * *

'In determining whether or not a publication is libelous per se the language of the publication itself can alone be looked to, without the aid of innuendoes, since the innuendo in libel cases is but the deduction of the pleader from the words used in the publication. Unless the pleader's deduction is supported by the language of the publication, the actionable quality of the publication is not legally disclosed. . . .'\(^{61}\)

* * * *


The Marland decision uses this definition of libel per se but appears to hold that special damages are not required if the colloquium and innuendo will support the meaning imputed to the words by the plaintiff. In Kight the Oklahoma court held the publication complained of was not libelous on its face, nor did it contain an inference within its four corners that made it defamatory.

A complete reading of the Kight opinion indicates that the Oklahoma court had adopted a policy of strictly construing the words alleged to be libelous before the issue is given to the jury, and that an ambiguity in meaning supporting both an innocent and defamatory impact will be resolved in favor of the defendant. Considering the earlier Oklahoma decisions cited in Kight, it appears that the Oklahoma court will endeavor to find a non-defamatory meaning if the words are not patently libelous, special damages being required for recovery in an action on the case for disparagement or injurious falsehood.

60. Chase v. New Mexico Publishing Co., supra note 59, at 148, 203 P.2d at 596, citing Dillard v. Shattuck, 36 N.M. 202, 11 P.2d 543, a slander case. The New Mexico Supreme Court, like many others, failed to observe the difference between libel and slander; Dillard announced that slander is more strictly construed than libel.

The supreme court also cites Newell, Slander and Libel §§ 542, 544, 549 (4th ed. 1924), to support the rule that the innuendo will be disregarded in determining whether the words are defamatory per se. A careful reading of the sections cited, and others associated with them, shows that Newell does not set forth such a proposition.

61. Id. at 149, 203 P.2d at 596, quoting Layne v. Tribune Co., 108 Fla. 177, 146 So.
'The article must be defamatory on its face "within the four corners thereof."

[T]hat plaintiff pleads and relies upon the innuendo set out in its petition to state a cause of action refutes the idea that the language is libelous per se; for words "which are libelous per se do not need an innuendo," and the converse is equally true, that words which do need an innuendo are not libelous per se.

It is impossible to reconcile all the cases cited in Chase to support the proposition that in considering whether the alleged libel is patent or latent the innuendo and extrinsic matter must be ignored. However, the Oklahoma libel decisions appear to have compounded a strict form of the innocent-meaning rule with a misapplication of non-defamation action on the case for injurious falsehood or disparagement. 64

234 (1933), quoting Wofford v. Meeks, 129 Ala. 349, 30 So. 625 (1901). (Emphasis by the New Mexico court.)

The final sentence of the quotation, describing the traditional function of innuendo, might also have deserved emphasis.

In Wofford the Alabama court equated libel per se with actionable per se. The use of innuendo is limited by the duty of the court to determine whether the meaning alleged by the innuendo can legally be attributed to the language of the publication. Wofford recognized that defamation may be indirect; special damages are not mentioned in Wofford.

The Layne decision speaks of libel per se and libel per quod, the latter apparently equated with the non-defamation actions of injurious falsehood or disparagement. Layne says the innuendo must be ignored unless it is supported by the language in question. This has been the accepted place of the innuendo; see note 8 supra.


63. Ibid., quoting Kee v. Armstrong, Byrd & Co., 151 Pac. 572 (Okla. 1915). (Emphasis by the New Mexico court.)

The Kee case, supra, was reconsidered by the Oklahoma Supreme Court in Kee v. Armstrong, Byrd & Co., 75 Okla. 84, 182 Pac. 494 (1919), in which the court discussed at length what it considered to be three classes of libel: (1) words that cannot possibly bear a defamatory meaning but might support recovery in an action on the case for disparagement or injurious falsehood upon proof of actual damage; (2) words that are reasonably susceptible of a defamatory meaning as well as an innocent meaning; and (3) words libelous per se, or on their face. The court decided the words in question were not libelous per se, nor were the words within the second classification because the plaintiff did not properly plead innuendo or extrinsic matter, i.e., the words would not bear the imputation ascribed to them by the plaintiff. It is for the court to decide whether or not the words will bear the meaning given by the plaintiff. The court did not say that innuendo or extrinsic matter will be ignored, nor did it say that special damages are required for the second classification of libel, latent libel.

64. See Note, 10 Okla. L. Rev. 474 (1957), discussing the confused state of Oklahoma law resulting from the per se-per quod distinction thought to have been announced in
In any event, the only authorities cited by the supreme court in *Chase* to support the rule that defamation shown by extrinsic matter or innuendo requires allegation and proof of special damages are *Corpus Juris* and *Corpus Juris Secundum*. Both publications in the sections cited by the supreme court in *Chase* discuss defamation generally, including both libel and slander within the term "defamation." For example, *Corpus Juris Secundum* cites only three decisions, and does little to clarify the libel-slander distinction by reference to words "actionable per se" and "defamatory per se."

Concluding the *Chase* decision, the supreme court, speaking of the plaintiff's inclusion in his complaint of innuendo and extrinsic matter, held that such inclusion was

satisfying that the article is not libelous per se, and special damages not being alleged, the complaint fails to state a claim upon which relief can be granted.

We conclude that the article, if libelous, is libelous per quod ....

The dissenting justices agreed with the legal principles expressed by the majority but believed that the words were libelous per se.

The first libel decision following *Chase* was *Del Rico Co. v. New Mexican, Inc.*, decided in 1952. *Del Rico* is significant for two reasons: (1) The innocent-meaning rule was adopted for libel; and (2) judicial guidelines for determining the sufficiency of pleading those cases relied upon by the New Mexico Supreme Court in *Chase*. The note suggests the Oklahoma court may now be applying two tests: (1) the court can hold the publication not libelous per se if the words cannot be reasonably capable of defamatory meaning; otherwise it is for the jury to say whether the publication is libelous; and (2) if an innocent meaning is possible, and in the absence of an allegation of special damages, a motion to dismiss the complaint will be sustained. It is not surprising that the note urges the Oklahoma court to clarify its position.

65. 36 C. J. Libel and Slander § 17 (1924); 53 C.J.S. Libel and Slander § 8 (1948).
66. Ibid.
67. 53 C.J.S. Libel and Slander § 8 n.57 (1948). One decision from Louisiana; the others are Ellsworth v. Martindale-Hubbell Law Directory, Inc., 66 N.D. 578, 268 N.W. 400 (1936); Manley v. Harer, 73 Mont. 253, 235 Pac. 757 (1925). In *Ellsworth* the court appears to be equating libel per quod with action on the case for disparagement or injurious falsehood. In *Manley* the court, after asserting that the publication must be viewed without reference to innuendo or extrinsic matter to determine whether it is libelous per se and would not then require a pleading of special damages, concluded by finding the publication libelous per se by considering the innuendo and extrinsic facts.
68. See note 19 supra, discussing the terminology of defamation.
69. 53 N.M. at 149-50, 203 P.2d at 596.
70. Id. at 150, 203 P.2d at 596.
71. 56 N.M. 538, 246 P.2d 206 (1952).
special damages were established. The trial court had dismissed the plaintiff's complaint on the ground that the words in the series of articles sued upon were not libelous per se or libelous per quod. Holding the words not libelous per se, the supreme court reiterated the new rules of law adopted in *Chase* and added the innocent-meaning rule for libel, first announced in *Dillard*, a New Mexico slander action.

Without questioning the finding of the trial court that the words were not libelous per quod, the supreme court considered the plaintiff's allegation of damages to see if it was sufficient to support a recovery in libel per quod. Under the facts of this particular case, the court adopted a policy that allegation of loss of business, unsubstantiated by names of the lost customers, would not suffice. Although a strict policy was adopted in *Del Rico* relating to the necessary particularity of alleging special damages, the door was left ajar for a future moderation of the rule:

> [W]e do not question that there may be circumstances which would justify ameliorating the rigors of the rule in its requirements as to particularity in pleading the special damage . . .

This statement offers hope to New Mexico plaintiffs in defamation actions when they must prove the defamation by resort to innuendo or extrinsic fact, insofar as the sympathy of the court might compel a relaxation of the requirement to avoid the harsh libel per se-libel per quod distinction and the strict innocent-meaning rule. The emphasis of a defamation action, except in the case of unequivocal,  

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72. The plaintiff explained its damages as follows:  
'[P]laintiff Del Rico Company suffered a loss of profits of at least $4,350.00 and suffered a loss of at least $42,775.00 from operations and was ultimately forced to sell its business at a loss of at least $160,000.00.'  

*Id.* at 549, 246 P.2d at 213.

73. For the exact language, see note 54 *supra*.

74. 56 N.M. at 550, 246 P.2d at 214.

75. *Ibid*.

76. See MacLeod v. Tribune Publishing Co., 52 Cal. 2d 553, 343 P.2d 36 (1959), in which the court, confronted with the California statute establishing the libel per se-libel per quod distinction, held that the statute would not preclude the pleading of an innuendo which merely explains the implied meaning apparent from the words themselves. The *MacLeod* decision overturned a number of earlier California cases and abolished the innocent-meaning rule in that state for one of ordinary meaning.

See also Karrigan v. Valentine, 184 Kan. 783, 339 P.2d 52 (1959); Koerner v. Lawler, 180 Kan. 318, 304 P.2d 926 (1956), for decisions showing the extremes to which courts will go in order to permit the plaintiff to recover while still preserving the special-damages requirement.
obvious libel per se, will then rest on the theory of pecuniary damage rather than relational damage to the reputation.

It seems that *Chase* and *Del Rico* support the proposition that in the minds of the justices a pleading of innuendo or extrinsic matter would prove conclusively that the words are not and could not be libelous per se. This doctrine was confused in *Young v. New Mexico Broadcasting Co.*,

77 decided in 1956. In *Young* the words were libelous per se,

78 but the plaintiff had also pleaded innuendo without a supporting plea of special damages. The supreme court disposed of this issue in a somewhat remarkable manner: The court distinguished *Chase* because in *Young* “the innuendo was not relied on to state a cause of action.”

79 Under the libel per se-libel per quod rule of *Chase* and the innocent-meaning rule

80 of *Del Rico*, the intrepid New Mexico plaintiff with a meritorious cause of action faces difficult decisions in planning his case. If the plaintiff has a strong case for libel per se, he dare not risk pleading innuendo or extrinsic matter to bolster his cause, for that pleading may prove that the words are not libelous per se. If he refrains from pleading innuendo or extrinsic matter, relying solely upon the defamatory impact of the words, it may be determined that the words are susceptible of both an innocent and a defamatory meaning. The ambiguity will be resolved in favor of the defendant and the innocent meaning. If the plaintiff is compelled to plead extrinsic matter or innuendo in the case of latent defamation—or merely the true, unembroidered facts to refute the false statements of the publication—he must somehow allege and prove special damages with sufficient particularity to satisfy the uncertain requirements of the rules. The plaintiff must measure the unmeasurable.

The strict rules of law pertaining to libel are harsh and fail to recognize the potential harm that can be inflicted upon the reputation of an innocent person through defamation, be it patent or latent. No legal or social policy appears to have forced the courts to interpose

77. 60 N.M. 475, 292 P.2d 776 (1956).
78. Id. at 477, 292 P.2d at 777-78.
79. Id. at 478, 292 P.2d at 778.
80. Dean Prosser has observed that California was apparently the last American jurisdiction to abandon the innocent-meaning rule. Prosser, *Torts* §106, pp. 764-65 (3d ed. 1964). Although New Mexico decisions have mentioned the “plain and natural” meaning of the words, the supreme court in the two most recent decisions has cited New Mexico authority supporting the rule of a single opprobrious and defamatory meaning. *Hoeck v. Tiedeboh*, 391 P.2d 651 (N.M. 1964); *Rockafellow v. New Mexico State Tribune Co.*, 397 P.2d 303 (N.M. 1964).
between the defamed plaintiff and a judgment vindicating his reputation a series of rules favoring only the defendant, making him virtually immune to judgment.

The courts need not surrender their right to determine as a question of law whether the publication is capable of a defamatory meaning; nor does there seem to be a persuasive reason for depriving the jury of the opportunity to determine whether or not the publication was understood in a defamatory sense, though the publication be susceptible of both an innocent and defamatory meaning.

The American modifications in the law of libel seem, in retrospect, founded in confusion and the reluctance of the courts to make the essential decision—is the publication defamatory or not defamatory? At least two states, New Jersey and Wisconsin, have recently asserted their return to the traditional doctrine of libel, casting aside earlier decisions that had confused the law of defamation. It is submitted that the New Mexico court should do likewise. As the means for protecting reputation are made more difficult and unequal in the courts, so will consideration and respect for the reputation decline.

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81. In Rockafellow v. New Mexico State Tribune Co., supra note 80, the supreme court made this significant declaration: "[T]he words complained of in the article, read in context, are not defamatory." 397 P.2d at 306.

The significant question in a libel case—Are the words defamatory or not defamatory?—has been obfuscated by the involvement of American courts in an endless struggle with the confusion inherent to the per se-per quod distinction and the nuances of its associated rules.

82. New Jersey:

[S]ome courts still persist in the latter-day aberration of the original rule of liability and require proof of special damages where the statement of the cause of action involves reference to and proof of extrinsic facts. . . . [W]e are free to reject . . . [the rule] as unauthoritative and unsound.

* * *

General damages will be presumed, as in any case of libel, or written defamation.


Wisconsin:

We adhere to and adopt the common-law rule of libel, as stated in sec. 569 of the Restatement of Torts on Defamation, that all libels are actionable without alleging or proving special damages.

Martin v. Outboard Marine Corp., 113 N.W.2d 135, 139 (Wis. 1962).