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NOTES

The Doctrine of Libel Per Se in Ohio

INTRODUCTION

Few areas of Ohio law have been so beset by confusion and conflicting decisions as the area of the law of defamation referred to as libel *per se*. This confusion is the more regrettable for it tends to obscure and obstruct the effective operation of defamation law. Defamation is a "relational tort," protecting one's interest in his reputation — which is the foundation of his relations with others — against those utterances which come within the definition of defamation.¹

A good reputation has long been regarded a most precious asset. Shakespeare expressed the feelings of many when he said: "who steals my purse steals trash. . . . But he who filches from me my good name . . . makes me poor indeed."²

¹Historically, words which held a person up to "hatred, ridicule or contempt" were deemed defamatory. The modern view holds words defamatory which "harm the reputation of another as to lower him in the esteem of the community or to deter third persons from associating or dealing with him." RESTATEMENT, TORTS § 559 (1938); see PROSSER, TORTS 574 (2d ed. 1955). Modern courts have tended to adopt the spirit of the modern definition, while retaining the pater of "hatred, ridicule or contempt." *e.g.* Burrell v. Moran, 38 Ohio Op. 185, 82 N.E. 2d 334 (C.P. 1948).

²Othello, Act III, Sc. 3, line 131; cited in McCarthy v. Cincinnati Enquirer, 136 N.E. 2d 393, 402 (Ohio App. 1956) (dissenting opinion).

HISTORICAL BACKGROUND

Understanding libel and libel *per se* as these doctrines now exist in Ohio, necessitates understanding the development of these actions in the common law courts.³

Slander, or spoken defamation, was originally recognized in the ecclesiastical courts and treated as a "sin." The action of libel, or written defamation, was at first administered by the Court of Star Chamber as a criminal action, often being used to suppress adverse opinion. When the common law courts took over jurisdiction of spoken defamation from the ecclesiastical courts, they interjected legalistic notions and required "temporal" or pecuniary damages as a pre-requisite to the maintenance of the action of slander, except for imputations in three categories. Oral imputations within these categories were actionable without the showing of actual damage, for damage was presumed from the more serious nature of the charges. These categories were: (1) the imputation of a serious crime;⁴ (2) the imputation of certain loathsome diseases;⁵ and (3) imputations adversely affecting the plaintiff in his business, trade or profession.⁶

When the common law courts took over the jurisdiction of libel, or written defamation, from the Star Chamber, they continued the latter's custom of holding written defamation actionable without proof of actual or "temporal" damage. This carry over may have been the result of the common law courts' adopting the concept of the Roman criminal law —

³Excellent accounts of the historical background of these actions are found in: RESTATEMENT, TORTS § 568, comment *b* (1938); *Developments in the Law — Defamation*, 69 HARV. L. REV. 875 (1956); PROSSER, TORTS 572 (2d ed. 1955); Note, 33 CHI-KENT L. REV. 313 (1955).

⁴The Ohio courts have limited this category rather strictly. In the following cases, slander *per se* was found to exist under the "serious crimes" category: *Schoedler v. Gauge and Equip. Co.*, 134 Ohio St. 78, 15 N.E. 2d 958 (1938) ("embezzlement"); *Zehring v. Zehring*, 25 Iddings T.R.D. (Ohio C.P. 1899) ("thief"). The following cases held the particular imputation not within this category: *Davis v. Brown*, 27 Ohio St. 326 (1875) (charging man with sodomy); *Hollingsworth v. Shaw*, 19 Ohio St. 430 (1869) ("military desertion"); *Pecyk v. Semoncheck*, 61 Ohio L. Abs. 465, 105 N.E. 2d 61 (Ct. App. 1952) ("communist"); *Byers v. Forest*, 4 Ohio Dec. Reprint 458, 2 Cleve. L. Rep. 194 (C.P. 1879) ("blackmailer"); *McKean v. Folden*, 2 Ohio Dec. Reprint 248, 2 West. L. Mo. 146 (C.P. 1859) ("bestiality"). See also *Dial v. Holter*, 6 Ohio St. 228, 241 (1856) ("the infamy of the offense . . . constitutes the test").

⁵*Kaucher v. Blinn*, 29 Ohio St. 62 (1875) ("venereal disease").

⁶*Hayner v. Cowden*, 27 Ohio St. 292 (1875) (charging a clergyman with drunkenness). A fourth category has been recognized in Ohio and in many other jurisdictions encompassing charges of lack of chastity made to a woman: *Malone v. Stewart*, 15 Ohio 319 (1846); *Helferich v. Taebel*, 15 Ohio Dec. 396, 2 Ohio L. Rep. 359 (C.P. 1904). See also PROSSER, TORTS 592 (2d ed. 1955).

which looked only to "reputational harm."⁷ It also may have been that the action of libel, which had been treated as a crime in the Star Chamber "was already established as the greater wrong" and "greater responsibility continued to be attached to it."⁸ In any case, the adoption of the rule was probably related to "the reverence of an illiterate nation for the printed word."⁹

Whatever the original basis for establishing the distinction as to the actionable nature of the written and the spoken word, the courts' decisions have uniformly rationalized the distinction on the grounds that:

In libel, the written or printed words are of necessity attended with more deliberation and coolness and hence are indicative of stronger malice than oral words, in addition to being embodied in a more permanent and enduring form and therefore calculated to do greater wrong and much more harm . . . (because of) . . . the opportunity it affords for disseminating the injurious matter.¹⁰

This justification and rationale was denounced by Lord Mansfield as early as 1812.¹¹ The indication of stronger malice is a "poor argument where liability does not rest on any intent to defame,"¹² and liability is established by merely showing the unprivileged publication.¹³ By the application of this distinction of form rather than substance, a plaintiff might recover for a written imputation read by a scant few persons, while another plaintiff might go remediless unless he could prove actual damages, when the same charge was made orally within the hearing of a large crowd. The attack upon the absurdities of the "written-spoken" dichotomy has been spurred by the conflicting and anomalous decisions that have resulted from the attempts of the courts to apply the antiquated concepts of libel and slander to the mass media of radio and television. It has been held that radio defamation constitutes publication of a libel;¹⁴ that such defamation is to be treated as slander;¹⁵ and it has been pro-

⁷ *De Libellis Famosis*, 5 Co. Rep. 125; 77 Eng. Rep. 250 (Star Ch. 1605); see *Developments in the Law — Defamation*, 69 HARV. L. REV. 875 (1956).

⁸ PROSSER, TORTS 585 (2d ed. 1955).

⁹ *Ibid.*

¹⁰ 25 OHIO JUR., *Libel*, § 4 (1932); accord, *Watson v. Trask*, 6 Ohio 531 (1834); *G.M. McKelvey Co. v. Nanson*, 5 Ohio App. 73 (1915); *Tappmeyer v. Journal-Republican Co.*, 22 Ohio N.P. (n.s.) 337 (C.P. 1920).

¹¹ *Thorley v. Lord Kerry*, 4 Taunt. 355, 128 Eng. Rep. 367 (Eng. C.P. 1812).

¹² PROSSER, TORTS 595 (2d ed. 1955).

¹³ *Id.* at 572; see *Tribune Publishing Co. v. Blossom*, 134 Iddings T.R.D. (Ohio C.P. 1899).

¹⁴ *Sorenson v. Wood*, 123 Neb. 348, 243 N.W. 82 (1932). The English Defamation Act of 1952, 15 & 16 GEO. 6 & 1 ELIZ. 2, c.66, cl. 1-2, establishes as libel all radio defamations.

¹⁵ *Meldrum v. Australian Broadcasting Co.*, (1932) Vict. L. Rep. 425.

posed that it is one or the other, depending on whether the speaker was reading from a script.¹⁶

The incredible judicial inertia which has perpetuated this distinction can be explained, at least in part, by the fact that there is considerable conflict as to what path the courts should follow in recasting the law of defamation.¹⁷ Many advocate a remedy of retraction, contending that "the damage remedy is . . . encumbered by technicalities,"¹⁸ while other observers have espoused a fundamental change in the damage remedy.¹⁹ Perhaps the most radical change actually made was in the adoption of a Uniform Defamation Act in two Canadian provinces. This Act abolishes the distinction between libel and slander and makes all defamatory publications actionable without proof of actual damages.²⁰

LIBEL PER SE

The law of defamation was further separated from reality and transported even more deeply into a morass of doctrinaire rules by the appearance of the "step-child" of libel — libel *per se*. Originally, all libelous publications were actionable without proof of actual damage.²¹ The early common law courts did employ a rule of *pleading* which distinguished between two classes of libel, which were labeled libel *per se* and libel *per quod*. Libel *per se* described those statements which were defamatory "on their face," while libel *per quod* described those charges which were not defamatory "on their face," but became so only by reference to extrinsic facts.²²

Under this rule of pleading, a written charge of communist membership today would be defamatory "on its face." To charge one with mem-

¹⁶ *Hartmann v. Winchell*, 286 N.Y. 296, 73 N.E.2d 30 (1947). See RESTATEMENT, TORTS § 568, comment *f* (1938); annot., 5 A.L.R. 2d 957 (1949). Some support is found in recent decisions for treating radio defamation as a new tort, distinct from both libel and slander. In this connection, see *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 8 A. 2d 302 (1939); *Kelly v. Hoffman*, 137 N.J.L. 695, 61 A. 2d 143 (1948).

¹⁷ PROSSER, TORTS 595 (2d ed. 1955).

¹⁸ Leflar, *Legal Remedies for Defamation*, 6 ARK. L. REV. 423 (1952). The Arkansas Lie Bill is discussed as a means of retraction. See also Note, 33 CHI-KENT L. REV. 313 (1955).

¹⁹ *Developments in the Law — Defamation*, 69 HARV. L. REV. 875 (1956). This proposal would distinguish between negligent and intentional defamations and in the former, base presumptions of damage on the foreseeability thereof.

²⁰ Man. c. 11 (Manitoba 1946); Abta. c. 14 (Alberta 1947). For a criticism of this Act and a rare approval of the "written-spoken" dichotomy in defamation, see Note, 34 MARQ. L. REV. 31 (1949).

²¹ See notes 7 and 8 *supra*.

²² *Developments in the Law — Defamation*, 69 HARV. L. REV. 875 (1956); Note, 17 SO. CALIF. L. REV. 347 (1944).

bership in the XYZ League would not be defamatory "on its face." If, however, the person could show by "inducement"²³ that this organization was known to be a communistic group and by "innuendo"²⁴ that this charge conveyed the meaning that the person was a communist, he could plead and recover under the category of libel *per quod*, without any proof of actual damage.

Unfortunately, two meanings of "per se" thus existed within the confines of the law of defamation. Slander *per se* indicated spoken charges which were actionable without proof of actual damage. Libel *per se* indicated a statement which was in written form and was defamatory "on its face." Through a process of conscious or unconscious transposition, many courts began to re-define libel *per se* in terms of being actionable without proof of actual damage. A rule of pleading became a substantive rule, with the courts declaring that "words . . . which require an innuendo to give . . . a libelous meaning . . . require evidence to show . . . some substantial injury."²⁵ Some courts came to hold that the *use* of an innuendo established the *need* therefor and thus proof of actual damage was required. This was because:

. . . the very fact that the plaintiff pleads and relies upon the innuendo set out in his petition . . . refutes the idea that the language is libelous, per se.²⁶

Through the avenue of "shifting-meanings," many courts thus divided the action of libel into two *substantive* entities — "per se" and "per quod." With the door to change and "progress" ajar, courts began to utilize the powerful semantic tool of "shifting-meanings" to further confuse this area. Adopting the view that there exists two substantive classes of libel — "per se" and "per quod" — and that only the former is actionable without proof of actual damage, these courts proceeded to re-define these already re-defined concepts and distinguished the two classes on grounds other than the necessity of reference to extrinsic facts to show the defamatory nature of the particular statement.²⁷

Some courts have implied that the categories of libel *per se* and slan-

²³ PROSSER, TORTS 582 (2d ed. 1955).

²⁴ *Ibid.* "The Function of the innuendo is to explain the words in light of the facts."

²⁵ *Brewer v. Hearst Publishing Co.*, 185 F. 2d. 846 (7th Cir. 1950); *accord*, *Landstrom v. Thorpe*, 189 F. 2d 46 (8th Cir. 1951); *Shaw Cleaners and Dyers, Inc., v. Des Moines Dress Club*, 215 Iowa 1130, 245 N.W. 231 (1932); *Bennett v. Seimiller*, 175 Kan. 764, 267 P. 2d 926 (1954).

²⁶ *Kee v. Armstrong, Byrd & Co.*, 75 Okla. 84, 182 P. 494 (1919).

²⁷ See *Developments in the Law — Defamation*, 69 HARV. L. REV. 875 (1956); Note, 17 SO. CALIF. L. REV. 347 (1944).

der *per se* are identical.²⁸ At least one Ohio case has adopted this view.²⁹ Other courts have held that a written statement is libelous *per se* only when the court can rule as a matter of law that the plaintiff's reputation has been injured.³⁰ In some jurisdictions, the seriousness of the charge has been stated to be the distinction separating these categories.³¹

LIBEL PER SE IN OHIO — A SEMANTIC RIDDLE

The distinction between written and spoken defamation has long been recognized in Ohio³² and in this state "a clear distinction exists between them in respect of their actionable character."³³ The distinction is justified on the ground³⁴ that written defamation is "embodied in a more permanent . . . form" and it is "indicative of stronger malice."³⁵

The Ohio courts have also adopted the substantive concept of libel *per se* — the "misbegotten monster" of the courts,³⁶ and have uniformly declared libel *per se* to be that segment of written defamation which is actionable without proof of actual damage. Whether a particular written imputation constitutes libel *per se* has been the point of conflict and confusion.

This confusion resulted from the presence, in the Ohio decisions, of two different tests or "meanings" of libel *per se*. One test, which may be labeled the "seriousness of the accusation" test, defined libel *per se* as encompassing all serious written defamations, whether apparent "on the face" of the publication or through extrinsic facts. The second test held libel *per se* to include only those statements which were defamatory "on their face." This latter test will be referred to as the "clearness of the accusation" test.

THE "SERIOUSNESS OF THE ACCUSATION" TEST

The "seriousness of the accusation" test looks to the gravity of the imputation, whether it is "on the face" of the publication or becomes ap-

²⁸ *Harrison v. Burger*, 212 Ala. 670, 103 S. 842 (1925); *Rachels v. Deener*, 182 Ark. 931, 33 S.W. 2d 39 (1930).

²⁹ *Hunt v. Meridian Printing Co.*, 17 Ohio C.C.R. (n.s.) 293, *aff'd without opinion*, 87 Ohio St. 522, 102 N.E. 1128 (1910).

³⁰ *Babcock v. McClatchy Newspapers*, 82 Cal. App. 2d 528, 186 P.2d 737 (1947).

³¹ *Bedekovich v. Hearst Corp.*, 141 N.Y.S. 2d 651 (Munc. 1955).

³² *Watson v. Trask*, 6 Ohio 531 (1834); *Newbraugh v. Curry*, *Wright* 47 (Ohio 1832); *Lakin v. Gun*, *Wright* 14 (Ohio 1831).

³³ *State v. Smily*, 37 Ohio St. 30, 34 (1881).

³⁴ See note 10 *supra*.

³⁵ *G.M. McKelvey Co. v. Nanson*, 5 Ohio App. 73, 74 (1915); *accord*, *Watson v. Trask*, 6 Ohio 531 (1834); *Tappmeyer v. Journal-Republican Co.*, 22 Ohio N.P. (n.s.) 337 (C.P. 1920).

³⁶ Note, 17 SO. CALIF. L. REV. 347 (1944).

parent only by reference to extrinsic facts. Therefore "the innuendo as to the intended meaning is sufficient to charge a libel *per se* . . ." ³⁷ and will allow a recovery without proof of actual damages.

This emphasis on the seriousness of the charge is readily seen in the language of the case of *Watson v. Trask*,³⁸ the apparent "fountain-head" of this test of libel *per se*:

Words of ridicule only, or of contempt, which merely tend to lessen a man in public esteem, or to wound his feelings, will support a suit for libel. . . .³⁹

The majority of later cases have followed the lead of the *Watson* case, emphasizing that if the tendency of the written words would be to lessen societal esteem towards the person about whom they were written, they are libelous *per se*.⁴⁰ And this would be true even though the words "may impute no moral turpitude to him. . . ." ⁴¹

The language of the numerous cases⁴² which have utilized this "seriousness" test seems to equate the requisite "seriousness" of the imputation with the standard definition of defamation⁴³ and to recite the standard patter of "hatred, ridicule or contempt," while still speaking of the need for "special damages to support an action for defamation, *per quod*."⁴⁴ By requiring a showing of special damages except for a libel *per se*, and then holding all written defamation to be libelous *per se*, these Ohio courts have, by utilizing this test, applied the classic rule that all libel is actionable without a showing of actual or special damage.

Several Ohio decisions have attempted to modify and make more selective the "seriousness of the accusation" test, saying that:

³⁷ *Tratnik v. Kalish*, 5 Ohio App. 258, 260 (1915). Support for the view that the Ohio courts have employed a dual test to determine the existence of libel *per se* is found in Note, 15 OHIO ST. L.J. 303 (1954).

³⁸ 6 Ohio 531 (1834).

³⁹ *Watson v. Trask*, 6 Ohio 531, 533 (1834).

⁴⁰ *State v. Smily*, 37 Ohio St. 30, 34 (1881); SEE *Cleveland Leader Printing Co. v. Nethersole*, 84 Ohio St. 118, 125, 95 N.E. 735, 737 (1911).

⁴¹ *Burrell v. Moran*, 38 Ohio Op. 185, 186, 82 N.E. 2d 334, 335 (C.P. 1948).

⁴² *Culmer v. Canby*, 101 Fed. 195 (6th Cir. 1900); *Merchants' Ins. Co. v. Buckner*, 98 Fed. 222 (6th Cir. 1899); *Tappan v. Wilson*, 7 Ohio 190 (1835); *Ward v. League for Justice, Inc.*, 93 N.E. 2d 723 (Ohio App.), *dismissed for want of debatable question*, 154 Ohio St. 367, 95 N.E. 2d 769 (1950); *Peer v. Hoiles*, 3 Ohio L. Abs. 653 (Ct. App. 1925); *G.M. McKelvey Co. v. Nanson*, 5 Ohio App. 73 (1915); *Grant v. Times Star Co.*, 9 Ohio Dec. (N.P.) (C.P. 619 1899); *Kahn v. Cincinnati Times-Star*, 8 Ohio N.P. 616, 10 Ohio Dec. (N.P.) 599 (C.P.), *aff'd without opinion*, 52 Ohio St. 662, 44 N.E. 1132 (1895); *Pugh v. Starbuck*, 1 Ohio Dec. Reprint 143, 2 West. L.J. 503 (C.P. 1845).

⁴³ One of the few decisions that accords this overt recognition is *Burrell v. Moran*, 38 Ohio Op. 185, 82 N.E. 2d 334 (C.P. 1948).

⁴⁴ *Bigelow v. Brumley*, 138 Ohio St. 574, 37 N.E. 2d 584, (1941).

. . . even if printed and published, mere words of ridicule, which tend to lessen a man in public esteem or to wound his feelings, are not always actionable without proof of special damages . . . (and) . . . to come within the rule permitting recovery, without proof of special damages, the words of ridicule or contempt must relate to matters which are required either by the moral code or the law of the land, liberally and not technically construed. . . .⁴⁵

Under the asserted modification ". . . it is not libelous to charge a man with doing that which he may lawfully do and which is not a violation of the moral code. . . ."⁴⁶

Under this modified "seriousness" test, a segment of written defamation — those utterances which charge neither a violation of the criminal code nor of the moral code — would be left to the action of libel *per quod*. This modification of the aforementioned test, however, has received relatively little attention from the Ohio courts and the vast majority of Ohio cases have followed the "seriousness" test unaffected by this restriction.

By means of the undiluted "seriousness" test all written defamation was held libelous *per se*, yet the Ohio courts applying this test still referred to an action labeled libel *per quod*, wherein actual damage was requisite to the maintenance of the action.⁴⁷ It seems that the courts were here confusing libel *per quod* with the related tort of "Injurious Falsehood,"⁴⁸ and thereby adding further confusion to their decisions by extending the process of "shifting-the-meanings." A non-defamatory statement may be actionable as an "injurious falsehood" if it is an "untrue and malicious charge" wherefrom "damage is shown to have resulted as a natural and proximate consequence."⁴⁹

The Restatement of Torts⁵⁰ has adopted the classic view of the actionable nature of libel and accordingly states that the ". . . publication of any libel is actionable *per se*, that is, irrespective of whether any special harm has been caused to the plaintiff's reputation or otherwise."⁵¹ A number

⁴⁵ *Holloway v. Scripps Publishing Co.*, 11 Ohio App. 226, 231 (1919); *accord*, *McCarthy v. Cincinnati Enquirer*, 136 N.E. 2d 393 (Ohio App. 1956); *Sweeney v. Beacon Journal Publishing Co.*, 66 Ohio App. 475, 35 N.E. 2d 471 (1941); *Ohio Public Service Co. v. Myers*, 17 Ohio L. Abs. 374, 6 N.E. 2d 29 (Ct. App. 1934).

⁴⁶ *Holloway v. Scripps Publishing Co.*, 11 Ohio App. 226, 233 (1919).

⁴⁷ See note 45 *supra*.

⁴⁸ PROSSER, TORTS 760 (2d ed. 1955).

⁴⁹ *Shaw Cleaners and Dyers, Inc. v. Des Moines Dress Club*, 215 Iowa 1130, 245 N.W. 231 (1932); see *Bigelow v. Brumley*, 138 Ohio St. 574, 37 N.E. 2d 584 (1941.)

⁵⁰ RESTATEMENT, TORTS § 569 (1934).

⁵¹ *Id.* at comment *c*.

of recent cases in this country have expressly followed the Restatement view and have held that ". . . any libel is actionable per se. . ."⁵²

The Ohio courts that employed the "seriousness of the accusation" test thus actually adopted the view of the Restatement, though this was obscured by the courts non-admission of their equating of libel *per se* with written defamation.

THE "CLEARNESS OF THE ACCUSATION" TEST

The "clearness of the accusation" test is the result of the "shift in meanings" which transposed a rule of pleading in libel actions into a substantive classification.⁵³ The adoption of this test for distinguishing between libel *per se* and libel *per quod* results in written utterances being actionable, *per se* (without proof of actual damage) only when they are defamatory, *per se* (defamatory "on their face").

This test has been enunciated in the decisions of many jurisdictions, which decisions have held that when the libelous nature of the imputation must be shown by innuendo, the plaintiff must plead and prove special damages and a failure so to plead may be taken advantage of by general demurrer.⁵⁴ One court articulated the core of this test succinctly, saying that:

. . . words which are libelous, per se do not need an innuendo and conversely, words which need an innuendo are not libelous, per se."⁵⁵

The "seriousness of the accusation" test has been most often utilized in Ohio decisions, but the "clearness" test has occasionally crept into a decision. Thus it was early held that:

. . . if the meaning is not clearly discoverable from . . . the text so that innuendo . . . is necessary . . . [it] would not be per se libelous.⁵⁶

With two tests existing among the Ohio decisions, hidden behind a screen of "semantic uniformity," it was inevitable that confusion would result within a single decision. In the case of *Westropp v. E. W. Scripps Co.*,⁵⁷ the Ohio Supreme Court displayed the results of this confusion in

⁵² *Preveden v. Croatian Fraternal Union of America*, 98 F. Supp. 784 (W.D. Pa. 1951); *Kindley v. Privette*, 241 N.C. 140, 84 S.E. 2d 660 (1954).

⁵³ See note 25 *supra*.

⁵⁴ *Walker v. Tribune Co.*, 29 Fed. 827, 829 (N.D. Ill. 1887); see *Brewer v. Hearst Publishing Co.*, 185 F. 2d 846, 850 (7th Cir. 1950).

⁵⁵ *Shaw Cleaners and Dyers, Inc. v. Des Moines Dress Club*, 215 Iowa 1130, 245 N.W. 231 (1932); accord, *Landstrom v. Thorpe*, 189 F.2d 46 (8th Cir. 1951); *Bennett v. Seimiller*, 175 Kan. 764, 267 P. 2d 926 (1954); *Chase v. New Mexico Publishing Co.*, 53 N.M. 145, 203 P.2d 594 (1949); *Kee v. Armstrong, Byrd & Co.*, 75 Okla. 84, 182 P. 494 (1915).

⁵⁶ *Settlage v. Kampf*, 10 Ohio Dec. Reprint 822 (C.P. 1899).

⁵⁷ 148 Ohio St. 365, 74 N.E.2d 340 (1947).

a four to three decision. The majority opinion exemplified, in spirit and language, the "seriousness of the accusation" test, emphasizing the fact that the defendant had "charged that the plaintiff, as judge of the Municipal Court . . . granted a continuance . . . motivated by . . . politically powerful friends . . ." of the accused.⁵⁸ The majority, however, felt compelled to take cognizance of the "clearness" test and thus stated that the innuendoes used by the plaintiff could be deleted "as surplusage."⁵⁹

The dissent in the *Westropp* case emphasized the "clearness" test, stating that when an innuendo is necessary to show the defamatory nature of the publication, such publication cannot be libelous *per se*.⁶⁰ The fact that the plaintiff employed innuendoes, said the dissenters, was an admission of the *need* therefor.⁶¹ As a result, continued the dissenters, "the petition with its innuendoes, presented a deficient cause of action for libel *per quod*" because "special damages constitute the sole basis of recovery in an action *per quod*."⁶²

BECKER V. TOULMIN — A SPRINGBOARD TO WHAT?

In recent months, the Ohio Supreme Court was once more confronted with the problem of libel *per se* in the case of *Becker v. Toulmin*.⁶³ In this case the plaintiff, Becker, had been employed by the defendant, but had voluntarily left the defendant's employ to go into the same business independently. Defendant sent telegrams to his customers with whom the plaintiff had dealt while in the defendant's employ. These telegrams read: "We have found it necessary to terminate employment our employee Walter Becker."

Plaintiff sued for libel, pleading through an innuendo that the meaning conveyed by the statement was that plaintiff was discharged because of some fault or incompetence on his part. The plaintiff did not plead special damages. The trial court judge submitted the question of libel *per se* to the jury and the resultant verdict was for the plaintiff.

The supreme court reversed the decision of the trial court and the affirming decision of the appellate court and entered final judgment for the defendant. The word "terminate" is a neutral word, said the court, and since this was a question of libel *per se* (no special damages were

⁵⁸ *Westropp v. E.W. Scripps Co.*, 148 Ohio St. 365, 375, 74 N.E.2d 340, 345 (1947).

⁵⁹ *Id.* at 372, 74 N.E.2d at 344.

⁶⁰ *Id.* at 380, 74 N.E.2d at 348.

⁶¹ *Ibid.*

⁶² *Westropp v. E.W. Scripps Co.*, 148 Ohio St. 365, 379, 74 N.E.2d 340, 347 (1947).

⁶³ 165 Ohio St. 549, 138 N.E.2d 391 (1956).

pleaded) reference could be had only to the "face" of the publication. On that basis the defendant was entitled to a directed verdict in the trial court, for libel *per se* is a question for the court — not for the jury.

Apparently taking heed of the confusion which abounded in this area and feeling an indication of direction was desperately needed, the court, in a unanimous⁶⁴ decision, thus utilized the *Becker* case as a spring-board for establishing the "clearness of the accusation" test as the test for libel *per se*. Without mentioning prior cases decided under the "seriousness" test and distinguishing the *Westropp* case on the ground that the innuendoes used therein were "surplusage," the decision aligns Ohio with those jurisdictions which have used the "shifting-meaning" device to breathe substantive life into a former rule of pleading.

The Ohio Supreme Court, in the *Becker* case, sets out the axioms of the "clearness" test:

Libel *per se* means libel of itself, or upon the face of a publication, whereas libel *per quod* is libel by an interpretation, through an innuendo. . . .⁶⁵

If a publication is not libelous *per se* but only *per quod*, such publication is not actionable in the absence of proof of special damage to the one claiming to be libeled.⁶⁶

By this ruling the court has, in the opinion of this writer, attributed an improper meaning to the concept of libel *per se*. Unlike the "seriousness" test, the "clearness" test utilizes the nebulous "per se" doctrine to move further away from the original law of libel which held all libels to be actionable without proof of actual damage. The absurd result of this test is to presume harm in the case of a statement defamatory "on its face," but not to do so when the defamatory nature must be shown by extrinsic facts. "Both injure reputation at the moment they are published"⁶⁷ and the harm is equal whether the defamation is "on the face" of the publication or is apparent to the recipient because of the extrinsic facts of which he knows.⁶⁸

By adopting the "clearness" test, the Ohio court is, in effect, defeating a great part of the social purpose of this tort action and vitiating the protection given to the interest of reputation. A large proportion of written defamations is "covert" or defamatory only in reference to extrinsic facts. The defamed person is now confronted with the obstacle of showing

⁶⁴ Made possible by the presence of three judges who were not on the court nine years earlier, when the *Westropp* case was decided.

⁶⁵ *Becker v. Toulmin*, 165 Ohio St. 549, 556, 138 N.E.2d 391, 397 (1956).

⁶⁶ *Ibid.*

⁶⁷ 17 SO. CALIF. L. REV. 347, 370 (1944).

⁶⁸ See *Development in the Law — Defamation*, 69 HARV. L. REV. 875 (1956); Note, 17 CO. CALIF. L. REV. 347 (1944).

actual damage before he will be accorded a right of action in libel *per quod*. These damages must be shown with specificity in such an action and ". . . if the plaintiff cannot give the names of those who have ceased to deal with him . . . he must fail in his suit, although there has in fact been a falling off in his business."⁶⁹ Often the people whom the plaintiff must call to prove the effect of the defamatory publication will be loath to state that the publication has affected their opinion of the plaintiff. As a result of the introduction of this distinction into the law of defamation, the defamed individual will be further handicapped in his attempts to secure redress through the courts.

With the potential adverse consequences of this decision apparent, it seems appropriate to inquire as to what motivated the decision of the Ohio Supreme Court. The adoption of the "clearness" test would tend to indicate a desire on the part of the Ohio court to establish a settled "meaning" for libel *per se* and at the same time to limit the role of the jury to an equal or greater extent than was obtained under the "seriousness" test. The utilization of the "seriousness" test aligned the Ohio courts with the classic rule which held all libels to be actionable without a showing of special damage — but shifted the bulk of the decision-making from the jury to the court. Under the original rule it was:

. . . for the court in the first instance to determine whether the words are reasonably capable of a particular interpretation; it is then for the jury to say whether they were in fact so understood.⁷⁰

Through the operation of the "seriousness" test which equated libel *per se* with written defamation, the Ohio courts limited the role of the jury by establishing the question of libel *per se* as one "for the court."⁷¹

As the "seriousness" test developed, however, many decisions began to intimate that the jury still had some function in the determination of the question of libel *per se*⁷² and ultimately the *Westropp* case stated that:

. . . in an action for libel the question whether the publication complained of is libelous, *per se* is *primarily* for the court and it is error to submit to the jury the question whether the publication is libelous, *per se*, *unless*

⁶⁹ *Shaw Cleaners and Dyers, Inc., v. Des Moines Dress Club*, 215 Iowa 1130, 245 N.W. 231 (1932).

⁷⁰ PROSSER, TORTS 581 (2d ed. 1955).

⁷¹ *Cleveland Leader Printing Co. v. Nethersole*, 84 Ohio St. 118, 95 N.E. 662 (1911); *accord*, *Mauk v. Brundage*, 68 Ohio St. 89, 67 N.E. 152 (1903); *Peer v. Hoiles*, 3 Ohio L. Abs. 653 (Ct. App. 1925).

⁷² *State v. Smily*, 37 Ohio St. 30 (1881); *Cleveland Retail Grocers' Ass'n. v. Exton*, 18 Ohio C.C.R. 321, 10 Ohio C.C. Dec. 145 (C.P. 1899); *Kahn v. Cincinnati Times-Star*, 8 Ohio N.P. 616 (C.P.), *aff'd without opinion*, 52 Ohio St. 662, 44 N.E. 1132 (1890); *Bishop v. Cincinnati Gazette Co.*, 7 Ohio Dec. Reprint 711 (C.P. 1880).

its meaning is so uncertain . . . as to require that the . . . meaning be submitted to the jury. (Emphasis supplied).⁷³

When faced with the *Becker* case, the Ohio Supreme Court apparently felt a clear-cut transition to the "clearness" test would be preferable to further qualifications of the "seriousness" test and, at the same time, would enable the court to re-establish as a settled rule that the question of "whether words of a publication are libelous, per se is a question for the court."⁷⁴

CONCLUSION

The historical distinction between written and spoken defamation, which makes substantive rights dependent upon form rather than substance, has been consistently criticized by the courts and by text writers as "remnants of long forgotten jurisdictional conflicts."⁷⁵ The advent of such mass media as radio and television may ultimately produce sufficient pressure to overcome the judicial inertia which has enveloped and perpetuated this area of tort law.

Until such time, the courts will best serve society by keeping the antiquated and legalistic concepts of the law of defamation in as close proximity to reality and social purposefulness as is possible.

By utilizing the semantic tool of the "shifting-meaning" and thereby interpreting libel *per se* so as to make only those written statements defamatory "on their face" actionable without proof of actual damages, the Ohio Supreme Court has established a distinction without basis in logic or social benefit. It is to deny reality to contend that a statement defamatory "on its face" will more certainly produce harm than another statement, the defamatory nature of which is readily apparent to recipients who have knowledge of extrinsic facts. By requiring specific actual damage to be pleaded and proved in cases of libel *per quod* — publications defamatory only in reference to extrinsic facts — this distinction vitiates the utility of this portion of tort law by denying relief to persons injured, but unable to show damages with the requisite specificity.

By the unequivocal adoption of the "clearness" test for libel *per se*, the Ohio Supreme Court provides only superficial clarity. Beneath the glaze, this test will result in further separating the doctrines of the law of defamation from reality and social utility.

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⁷³ *Westropp v. E.W. Scripps Co.*, 148 Ohio St. 365, 373, 74 N.E.2d 340, 345 (1947).

⁷⁴ *Becker v. Toulmin*, 165 Ohio St. 549, 554 (1956). The court does admit that the "definition" of a word "might be a jury question." *Id.* at 555.

⁷⁵ PROSSER, TORTS 595 (2d ed. 1955).