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Libel and Slander--The Innocent Construction Rule

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based upon inferences from evidence. Thus, the art of advocacy would play its rightful part in presenting a reasonable guideline to the jury.

None of the pro-Botta arguments are adequate to refute the value of the per diem method of ascertaining damages for pain and suffering. The instant case held that use of the per diem approach in computing damages for pain and suffering was reversible error even though the jury's verdict was not per se excessive. Judge Brown in dissenting said, "...if the evil feared is excessive verdicts, then the cure ought to be directed against the product, not the practice." Excessive verdicts may be cured by a trial judge's proper use of discretion in preventing unreasonable arguments based on the per diem approach. The court's instructions to the jury should clarify the fact that the per diem argument by counsel was merely for illustrative purposes and not evidence of a sum certain. The use of the per diem method in West Virginia would be of valuable assistance to juries and would take the formulation of a verdict for pain and suffering from the realm of speculation.

James Truman Cooper

Libel and Slander—The Innocent Construction Rule

As an employee of the defendant corporation, P was responsible for calculating the cordage of wood shipped to the corporation mill in another city. His figures compared favorably with those of the mill for a period of five years. Suddenly, for some inexplicable reason, an unusual discrepancy persisted. As a consequence, P was discharged. At a meeting of some corporation employees, D made reference to the trouble involving P and linked it with another problem involving inventory shortage where an employee had been dismissed under a strong suspicion of stealing. Although D maintained that his intent was only to charge P with negligence or inefficiency, witnesses who knew the facts concerning the inventory shortage inferred that D's statement was an accusation that P was guilty of stealing pulpwood. In the slander action brought by P against D and the corporation, the trial court denied D's motion for judgment notwithstanding the verdict. Held, affirmed. Where words allegedly slanderous may be given either an innocent or a slanderous interpretation, the jury must determine the sense in
which the words were used in light of the extrinsic circumstances. *Davis v. Niederhof*, 143 S.E.2d 367 (S.C. 1965).

In modern usage, slander means defamation by spoken words which tend to prejudice the reputation or means of livelihood of another. *Little Stores v. Isenberg*, 26 Tenn. App. 357, 172 S.W.2d 13 (1943). A categorical analysis of allegedly defamatory words reveals three distinct divisions: (1) those which cannot possibly bear a defamatory meaning, (2) those which are obviously defamatory, (3) those which are ambiguous and susceptible of either an innocent or a slanderous interpretation. 53 C.J.S. *Libel & Slander* § 5 (1948). In order to distinguish between the latter two categories, courts have designated words which require innuendo to support the defamatory meaning as slander per quod and words which are defamatory without explanation as slander per se. *Brewer v. Hearst Publishing Co.*, 185 F.2d 846 (7th Cir. 1950).

Ambiguous language presents a dilemma that has been difficult for courts to resolve. The struggle to establish and define a measurable standard by which the courts may test the sufficiency of a claim has been a significant objective in the development of defamation law. In striving to attain such an objective, judicial efforts have been stymied by a conflict between the desire of the courts to control the number of defamation actions and the traditional role of the jury in the determination of such objectionable language. Note, *The Innocent Construction Rule: A Minority of One*, 30 U. Chi. L. Rev. 524, 525 (1963).

As in the instant case, courts of the various states generally have permitted the jury to make this determination. Such policy has some merit when considered in the light of the general principle that it is the province of the court to determine whether the words are capable of defamatory meaning and the province of the jury to determine in what sense the words were used. *Rocky Mountain News Printing Co. v. Fridborn*, 46 Colo. 440, 104 Pac. 956 (1909). However, the approach affords very little power to the court in the determination of whether words of this type shall be actionable.

A second approach to the dilemma of ambiguity involves the proof of damages. At common law all libel and some slander was actionable regardless of damage; but with the increasing number of defamation actions, courts have found it necessary to modify and limit this general principle. The most popular modification
has been to apply the libel per se doctrine, requiring that special damages be pleaded if the defamatory meaning does not appear without resort to innuendo. Note, Defamation, 69 Harv. L. Rev. 875, 889 (1956).

In dealing with this problem, the Illinois courts have developed the innocent construction rule. The rule requires that allegedly defamatory words which are capable of an innocent interpretation must be so read and declared nonactionable as a matter of law. John v. Tribune Co., 24 Ill. 2d 437, 181 N.E.2d 105 (1962). The doctrine is predicated upon the desirability of according to the courts the power to control defamation actions. Its effect is to broaden the scope of nonactionable language. In its ultimate refinement, the rule would require a complainant to prove a prima facie case that the defamatory meaning was the only inference to be drawn. Note, 30 U. Chi. L. Rev., supra at 524.

The courts in Illinois have successfully employed the doctrine on appellate and federal levels for more than a decade. Porcella v. Time, Inc., 300 F.2d 162 (7th Cir. 1962); Alster v. Illinois Soc'y of Professional Engr's., 56 Ill. App. 2d 145, 205 N.E.2d 658 (1965); John v. Tribune Co., supra. Its success in other jurisdictions has been minimal. After seventeen years of existence in California, the California Supreme Court reversed its position because of the unlimited possible scope in applying the doctrine. MacLeod v. Tribune Publishing Co., 52 Cal. 2d 536, 343 P.2d 36 (1959).

Despite the misuse of the doctrine in California in Peabody v. Barham, 52 Cal. App. 2d 581, 126 P.2d 668 (1942), the innocent construction rule when applied within reason may be of value in controlling the principles of defamation law. In Illinois the rule has been applied in three recurring instances: (1) where an individual has been ascribed membership in or sympathy with a controversial group, (2) where the individual can only be identified by colloquium, (3) where the publication is true but has the unintended effect of defaming an individual. Note, 30 U. Chi. L. Rev., supra at 532.

However, a finding of an innocent interpretation in one of these instances may not preclude the plaintiff's recovery in Illinois. The court has left unanswered the question of whether the words are actionable if the plaintiff alleges special damages. The ultimate answer will depend upon the court's interpretation of the purpose
of the rule. If the rule has been adopted to define a minimum standard of defamation, pleading special damages would not effect a different result. On the other hand, if the purpose is to establish a basis from which the court may presume general damages, proof of special damages would guarantee recovery despite the innocent character of the words. Note, 30 U. CHI. L. REV., supra at 530.

Dicta in some recent Illinois cases applying the rule would seem to support the latter viewpoint. In Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N.E.2d 742 (1952), the court held that the defendant's statements were not of such a character that the court would presume special damages. Moreover, in Hambric v. Field Enterprises, 46 Ill. App. 2d 355, 196 N.E.2d 489 (1964), the court found that the words were not libelous per se and, therefore, required proof of special damages.

The approach to ambiguity in West Virginia is in part regulated by statute. The insulting words statute makes actionable all words which from their ordinary usage are construed as insults and tend to result in violence and breach of peace. The statute further provides that no demurrer shall preclude a jury from passing on the language. In an effort to suppress dueling, the legislature passed this statute. The singular aspect of this statute is that, unlike common law defamation, no publication of defamation is required by the statute. W. VA. CODE ch. 55, art. 7, § 2 (Michie 1961).

Although in light of the statutory provision the law seems settled in this area, a review of the cases involving language regulated by the statute reveals some inconsistencies. Moreover, where the language fails to fall within the scope of the statute an entirely different result is possible.

In City of Mullens v. Davidson, 133 W. Va. 557, 57 S.E.2d 1 (1949), the court held that the statute operates to deprive the court of the power to entertain a demurrer which would preclude the jury from passing upon the language. The court in this instance relied upon the ruling in Barger v. Hood, 87 W. Va. 78, 104 S.E. 280 (1920), where the court held that it was the contemplation of the legislature that juries were better qualified to determine what language is insulting.

However, a different result was reached in Parker v. Appalachian Elec. Power Co., 126 W. Va. 666, 30 S.E.2d 1 (1944).
Despite the statute the court held that the demurrer should have been sustained because the statement unexplained by innuendo was not defamatory and that the declaration alleged no state of facts which would justify the meaning the plaintiff was attempting to attach. This inconsistent position is noted in the opinion of City of Mullens v. Davidson, supra, but the Parker case was not overruled.

The language of Argabright v. Jones, 46 W. Va. 144, 32 S.E. 995 (1899) does not seem to fall within the statute. In this instance, the West Virginia Supreme Court reversed the decision because of failure to sustain a demurrer. The demurrer was grounded upon the theory that there was no basis for inferring that the statement applied to the plaintiff. In reversing the decision, the court said: “Looking, then, at the article as it appeared, we cannot say that it warrants the construction sought to be placed upon it by innuendoes.” The added significance of the Argabright decision is that the factual situation is analogous to the type of case where the Illinois court has applied the innocent construction rule. The similitude involves an attempt by a plaintiff not a target of the defamation to attach defamatory meaning by innuendo.

These decisions seem to indicate a desire of the court to retain some control over construction despite the statute. Supporting this viewpoint is the following statement by the court in Alderson v. Kahle, 73 W. Va. 690, 80 S.E. 1109 (1914): “The defendant is not necessarily held to accountability for the use of words in their technical or even ordinary meaning.” The language and actions of the West Virginia court are perhaps an indication that the court follows the Illinois doctrine in form if not in expressed theory.

Ellen Fairfax Warder

Labor Law—Member's Right to Presence of Counsel in Union Hearings

P, a union member, sought injunctive relief and damages from an alleged denial of a “full and fair” hearing in a union disciplinary proceeding. He contended that it was impossible to have had a fair hearing because he was not permitted the presence of counsel from outside the union membership in his behalf. P further asserted that the sixth amendment to the United States Constitution guaran-