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COMMENT

LIBEL AND SLANDER—DISPARAGEMENT OF PRODUCT—EXPANDING PROTECTION AGAINST TRADE LIBEL.

To what extent may an advertiser refer to the products or goods of a competitor without being subject to legal liability? Clearly, neither a truthful comparison of readily ascertainable physical characteristics of two products nor words of disparagement that have a basis in truth are actionable.[1] Thus, to say truthfully that car *X* is ten inches longer than car *Y* is not actionable. At the other end of the spectrum, words which though directed at the quality of the product, in effect impute to the dealer or maker dishonesty, fraud, deception, or other trade misconduct, are per se libel and expose the publisher to an action for damages.[2] To state untruthfully that the furs which *X* store is selling as real mink are actually synthetic material would impute fraud to the seller and be actionable as a personal libel. The area between these two extremes is the subject matter of this comment. Besides considering the types of statements that are actionable, the injured merchant's choice of remedies will also be explored.

At this point it should be made clear that not only competitors, but also dissatisfied customers and even complete strangers may be guilty of trade libel. Actually, the dissatisfied customer can often be a greater menace to the well-being of the local merchandiser than the competitor. Although his remarks may not be as widely disseminated as the latter's, they reach a more selective class of people — his neighbors and friends who, in all probability, shop in the same area as he does. Thus, they reach the merchant's immediate market. Moreover, since these disparagements are made by a comparatively disinterested party rather than by a competitor, they are probably given more credence by those who hear them.[3] Unlike a competitor's advertisement which, though damaging, may be taken with a grain of salt in light of its source and obvious purpose, the words of a dissatisfied customer are greeted with much less skepticism. This is, of course, not meant to imply that if a merchant gives poor service and/or handles second class merchandise, a person should not have a right to complain and make his views known in a truthful manner; rather it means that if a customer is untruthful in his criticism he subjects himself to the same liability as a competitor would.

1. Rosenberg v. J. C. Penny, 30 Cal. App. 2d 609, 86 P.2d 696 (1939).
2. Rosenberg v. J. C. Penny, *supra* note 1; Le Messena v. Storm, 62 App. Div. 150, 70 N.Y. Supp. 882 (1901).
3. An exception to this statement would probably exist in regard to claims made in reference to physical facts by well known manufacturers with national reputations. *E.g.*, the validity of an advertisement by Chevrolet claiming that their car is four inches longer than a comparable Ford would probably never be questioned by the general public.

There are several ways in which one can verbally injure the product of another. Disparagements include: (a) stating flatly that *X* product is of poor quality, (b) stating that in comparison to our product, *X* product is inferior, (c) negative inferences resulting from the unwarranted omission of a product from a listing of similar products made up by an independent third party, or (d) stating that our product *Y* is better than *X*, which, though it inferentially says that *X* product is inferior, is not actionable as a trade libel.[4] Also, mere puffing or words that disparage a whole industry are not actionable. The product which has been disparaged does not have to be specifically named, however; if from the tone of the words or advertisement, only one product could be referred to, then recovery is allowed for the injury.[5]

I.

DAMAGES IN THE STATE COURTS.

The cause of action for trade libel is derived from the action of slander of title. It is a well recognized principle that damages can be recovered for false statements made about the quality of goods of another. Unlike defamation of the person, it makes no difference whether the disparagement is oral or written and truth is always a defense.[6] However, there are many different views among the states as to what must be proved in order to recover. Malice is generally required, but the elements necessary to show malice vary from state to state. They range from a mere allegation that the defendant acted maliciously, coupled with proof of the falsity of the statement from which the malice is inferred,[7] to a requirement that the plaintiff prove that the false statements were intended to injure his business;[8] still another jurisdiction requires proof that the defendant knew the statement to be false.[9] When a non-competitor makes the remark, a showing that he should have known that the remark was disparaging has been held to be a sufficient proof of malice.[10] Malice

4. Rosenberg v. J. C. Penny, 30 Cal. App. 2d 609, 86 P.2d 696 (1939).
5. Shaw Cleaners and Dyers v. Des Moines Dress Club, 215 Iowa 1130, 245 S.W. 231 (1932). In this case plaintiff was the only cleaner in town advertising a half-price special in cleaning clothes. Defendant ran an advertisement saying that half-price cleaning was half-way cleaning. The defendant did not mention any names of competitors in the advertisement but the plaintiff was allowed to bring his cause of action for trade libel.
6. Nowry v. Raabe, 89 Cal. 606, 27 Pac. 157 (1891); Dooling v. Budget Publishing Co., 144 Mass. 258, 10 N.E. 809 (1887); Cosgrove Studio & Camera Shop v. Pane, 21 Pa. D. & C. 89 (1960). For a general discussion of the growth of this cause of action see BOWER, ACTIONABLE DEFAMATION 210 (2d ed. 1923); Smith, *Disparagement of Property*, 13 COLUM. L. REV. 121 (1913).
7. Shaw Cleaners and Dyers v. Des Moines Dress Club, 215 Iowa 1130, 245 S.W. 231 (1932).
8. Mowry v. Raabe, 89 Cal. 606, 27 Pac. 157 (1891).
9. Blens Chemical, Inc. v. Wyandotte Chemical Corp., 197 Misc. 1066, 96 N.Y.S.2d 47 (Sup. Ct. 1950).
10. Paramount Pictures, Inc. v. Leader Press, Inc., 106 F.2d 229 (10th Cir. 1939); Comment, 63 YALE L.J. 65, 82-84 (1954).

thus has a chameleon character that varies according to the jurisdiction in which the action arises. Where a disinterested party, who is neither a competitor nor an owner of a brand *X* car, disparages *X* cars, malice is quite easy to prove under any of the above tests. Where the interested party who makes the remark is a dissatisfied customer, malice is still quite easily shown. But when the interested party is a competitor, proof of malice may be more difficult since it can be argued that probably one's primary purpose is to sell his own product and thus advance his property interest rather than to tear down his rival's. This difficulty would be most notable in those jurisdictions which require an actual intent to injure the plaintiff in his business.[11] The greatest difficulty arises when one seeks to prove malice on the part of a disinterested medium which transmitted the remark, such as a newspaper which published a disparaging advertisement. This obstacle is undoubtedly the reason why no cases have been found in which a suit for damages has been instituted solely against such a disinterested party.

In most jurisdictions the real problem and chief obstacle in the path of recovery for product libel is the requirement that plaintiff prove special damages. With the exception of two states,[12] special damages are essential to recovery, and allegations of general damages and a general decline in business are insufficient.[13] The traditional notion of special damages is that in order to recover plaintiff must specify the names of customers lost because of the false disparagement.[14] This has made recovery almost an impossibility. It is an extremely difficult task to find a customer who declines to trade with a merchant because of a trade libel and it is almost impossible to find new customers who would have traded with the merchant but for the disparagement. When old customers cease to trade, the neighborhood storekeeper probably has little idea of who these people are and where they can be contacted; the owner of a large establishment would have even less idea. Thus the requirement is entirely unrealistic and overly burdensome and may explain why the action for trade libel is neither

11. However, not one case was found which was reversed on the ground that the requisite malice was not present.

12. In Mowry v. Raabe, 89 Cal. 606, 27 Pac. 157 (1891), defendant said that plaintiff sold diseased meat. There was no allegation of special damages and plaintiff was allowed recovery for general damages. In Pendleton v. Time, Inc., 339 Ill. App. 188, 89 N.E.2d 435 (1949), defendant published a portrait of President Truman saying it was the first portrait done of him. Defendant knew that plaintiff had done the first portrait of the President. Plaintiff sued for general damages for loss of reputation and commissions without a specific showing of lost customers. The court allowed these allegations to stand in reversing a motion to strike. In Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946), defendant never included any of plaintiff's music in its top ten selections. There was no allegation of special damages in the traditional sense but in a later case, Blens Chemical, Inc. v. Wyandotte Chemical Corp., 197 Misc. 1066, 96 N.Y.S.2d 47 (Sup. Ct. 1950), New York held that special damages still had to be proved.

13. Cosgrove Studio & Camera Shop v. Pane, 21 Pa. D. & C. 2d 89 (1960).

14. Shaw Cleaners & Dyers v. Des Moines Dress Club, 215 Iowa 1130. 245 S.W. 231 (1932); Cosgrove Studio & Camera Shop v. Pane, *supra* note 13.

a well-known nor a frequently used remedy.[15] It is not surprising, therefore, that courts in some jurisdictions have relaxed these standards in analogous libel cases where recovery for loss of business is sought. In a personal libel action where the plaintiff also sought recovery of special damages for the loss of business, a showing that a large number of old and established patients of a dentist cancelled their appointments[16] and that there had been a sharp decline in the number of new patients normally to be expected, was held sufficient for a recovery of special damages.[17] In an action for slander of credit, in which special damages were alleged for loss of business, it was held that it is not always necessary to name the customers whose business was lost because of the defamation.[18] In another case, when plaintiff showed that his average net income dropped from $300 to $100 per week after the alleged libel, recovery was allowed for the lost profits.[19] In these cases the courts realized that to show specific lost customers is a practical impossibility which, in effect, prevents recovery. While these cases do not deal with trade libel, they are similar in that recovery in each was contingent upon a showing of special damages to business; therefore, it seems that courts should be receptive to an argument that more lenient standards of proof are also sufficient to prove special damages in trade libel cases.

While the accepted view of special damages is felt to be too restrictive, the view of these other cases may actually be too broad in that it tends to disregard the problem of causation. A general decline in business, evidenced by records kept in the ordinary course of business, should definitely be admissible to prove loss. But these records should not be proof per se. The plaintiff should also be required to prove that neither (1) was there a decline in business in general, nor (2) was the loss attributable to a natural decline in demand for his particular product. These two requirements are not as formidable as they may seem and indeed are much easier to satisfy than it is to show lost customers. Either the records of stores dealing in like products or recognized market reports would be acceptable proof of the general level of business activity and the level of demand for the type of product involved. Also, if the business is nation-wide, proof of a drop in business in the locale where the derogatory remarks were made, while business remained the same or advanced in other areas, would be a sufficient showing that the trade libel caused the loss of business and that it did not result from other factors. If these two

15. Recovery has been very sparse in this area and most of the reported cases deal with the problem of sufficiency of the allegations in the complaint. The requirement that a merchant find lost customers can be compared to asking a fisherman to find the fish in the lake that did not take his bait. At worst, this requirement could even prompt a merchant to manufacture lost customers in order to recover losses sustained from a trade libel which he otherwise could not prove.

16. Professional men are unusual in this field in that they, unlike the average shopkeeper, generally enjoy a closer relationship with their customers.

17. Mac Leod v. Tribune Publishing Co., 52 Cal. 536, 343 P.2d 36 (1959).

18. Davis v. Trust Co. of New Jersey, 26 N.J. Misc. 111, 57 A.2d 380 (1948).

19. Walker v. Sheehan, 80 Ga. App. 606, 56 S.E.2d 628 (1949).

requirements are included, a rule permitting special damages to be proved by showing a decline in business would be a desirable advance in the action for trade libel; for it is obviously inequitable to allow a person to disparage the quality of another's product with impunity because a too strict requirement for the proof of damages prevents effective redress.

II.

INJUNCTIONS IN THE STATE COURTS.

Where the disparagement is continuous, the quest by the injured merchant for injunctive relief in equity has met with more success than his excursions into law courts. While it was once true that equity would not enjoin a trade libel no matter how great the harm to the merchant's property rights and how inadequate other remedies might be,[20] this is no longer true. Although an injunction for a trade libel by itself has been allowed in only one case,[21] equity courts have not been reluctant to act and enjoin false words once something more than a trade libel alone is shown. There are many ways in which equity has taken jurisdiction in these cases, but not all states have granted relief on the same facts or for the same reasons. It has been held that if the plaintiff gets a judgment at law first and then it is shown that this is inadequate because of the insolvency of the defendant, equity will issue an injunction.[22] Because of the practical difficulties discussed above recovering a legal judgment for damages, this remedy in equity is of little value. The fact that insolvency of a defendant is not a usual ground of equity jurisdiction has also deterred the majority of states from using this ground for relief. The most usual ground occurs when the continuing acts of the defendant are motivated by malice and the unjustified disparagement causes irreparable injury to the plaintiff's business.[23] The repetition of the action and the inability of a court of law to prevent continued conduct give equity grounds for jurisdiction over and above the trade libel and thus it will enjoin the wrongful conduct including the trade libel.[24] An injunction has also been issued for product disparagement

20. A. Hollander & Sons, Inc. v. Jos. Hollander, Inc., 117 N.J. Eq. 578, 177 Atl. 80 (1935); Singer v. Romerrick Realty Corp., 255 App. Div. 715, 5 N.Y.S.2d 607 (1938); Marlin Firearms Co. v. Shields, 171 N.Y. 384, 64 N.E. 163 (1902).

21. Gilly v. Hirsch, 122 La. 966, 48 So. 422 (1909). The Massachusetts courts have been lavish in the scope of the words they have used to define equity jurisdiction. The Supreme Judicial Court said in Kenyon v. City of Chicopee, 320 Mass. 528, 70 N.E.2d 241 (1946), that the jurisdiction of equity includes the prevention of unlawful interference with a person's right to carry on a business in general and it extends to the protection of a business against repeated libels or disparagement of goods. However, no case has tested the value of this dictum. See, Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946).

22. Wolf v Harris, 267 Mo. 405, 184 S.W. 1139 (1916).

23. National Life Ins. Co. v. Myers, 140 Ill. App. 392 (1908); Kenyon v. City of Chicopee, 320 Mass. 528, 70 N.E.2d 241 (1946).

24. J. C. Pitman & Sons v. Pitman, 29 Del. Ch. 189, 47 A.2d 721 (1946); Krebiozen Research Foundation v. Beacon Press, 334 Mass. 86, 134 N.E.2d 1 (1956); Menard v. Houle, 298 Mass. 546, 11 N.E.2d 436 (1937); Davis v. New

where two or more defendants were involved and the trade libel was motivated by a conspiracy to harm plaintiff's business, or an attempt to intimidate or coerce the plaintiff to do something or to extort something from him.[25] Moreover, where it can be shown that the damages at law are inadequate because of the impossible task of finding customers who were lost, at least one jurisdiction will grant equitable relief.[26] Equity will also act when it can be shown that the disparagement is more than a mere trade libel and that it was made with the intent to injure the plaintiff's business.[27] This particular facet of equity jurisdiction is particularly applicable to competitors since it is almost a foregone conclusion that the disparaging remarks were made to injure his rival's business even though his main intent may have been to sell his own product. A final ground for equity jurisdiction, applicable only to competitors, is unfair competition.[28] On a showing of unfair competition because of the disparagement of the product, equity will enjoin the unfair competition, and in so doing, enjoin the libel.

These equitable bases are not mutually exclusive and usually overlap to at least some degree. As an example, there seems to be no essential difference between a continuing course of conduct that causes irreparable harm and an intent to injure the plaintiff in his business by a continued disparagement of his product. The continuousness of his course of conduct permits equity to issue an injunction against even one who publishes injurious false statements without knowing they are false and without an intent to injure the plaintiff. Also this would cover a trade libel occurring by negative inference, *e.g.,* when a person gives a purported full list of merchants offering a particular product and leaves out plaintiff, a dealer in that product. All these grounds for equitable jurisdiction are not employed in every state, but a good many states recognize some or all of them. Indeed it is a rare trade libel that does not fit under one or more of these headings, thus it can be said that equity will virtually always enjoin a trade libel, though it may be under the guise of granting relief for some other wrong.

A great deal of confusion has been engendered in equity by the failure of the courts to distinguish personal libel and slander from trade libel.

England Ry. Pub. Co., 203 Mass. 470, 89 N.E. 565 (1909); West Willow Realty Corp. v. Taylor, 23 Misc. 2d 867, 198 N.Y.S.2d 196 (Sup. Ct. 1960).

25. Menard v. Houle, 298 Mass. 546, 11 N.E.2d 436 (1937); Lawrence v. Atwood, 295 S.W.2d 298 (Civ. App. Tex. 1956); McMorries v. Hudson Sales Corp., 233 S.W.2d 938 (Civ. App. Tex. 1950).

26. Carter v. Knapp Motor Co., 243 Ala. 600, 11 So. 2d 383 (1943). This appears to be the only case in which equitable jurisdiction is based upon the fact that damages cannot be proved at law rather than on the fact that they are inadequate.

27. Lawrence Trust Co. v. Sun-American Publishing Co., 245 Mass. 262, 139 N.E. 655 (1923); Wolf v. Gold, 9 A.D.2d 257, 139 N.Y.S.2d 36 (1959); Saxon v. Torino, 166 Misc. 863, 2 N.Y.S.2d 885 (Sup. Ct. 1938); Yood v. Daly, 37 Ohio App. 574, 174 N.E. 779 (1930).

28. H. E. Allen Mfg. Co. v. Smith, 224 App. Div. 187, 229 N.Y. Supp. 692 (1928). Nims, *Unfair Competition by False Statements or Disparagement,* 19 CORNELL L.Q. 63 (1933).

While there are many considerations, such as freedom of speech, that may compel a court to refuse to enjoin personal libel, these considerations are not as compelling when trade libel is involved. The former deals with a personal right, whereas a trade libel, whether oral or written, interferes with the property right one has in his business. The character of this injury has led courts to disregard a claim of freedom of speech as a valid objection to their power to enjoin trade libels. Freedom of speech is not an absolute right; it is limited by other equally precious freedoms, such as the right to carry on a business. One does not have the right to employ free speech maliciously to injure another.[29] Also, trade libels occurring in advertisements are purely commercial pronouncements, and hence would not be protected by the First Amendment.[30] Since a merchant's good will and reputation for handling quality products are his main assets in attracting the public, a continued and unjustified attack against his product should be stopped as quickly and as adequately as possible; the only effective way to accomplish this is by injunction.

When a merchant brings an action to enjoin a trade libel, he is interested in stopping continuing false statements about his product. Regardless of what the intent of the defendant may be, the means are the same — continuing false statements about the plaintiff's product — and the resulting injury is the same. It is the repetition that makes an injunction the desirable form of relief and the falsity that causes the invasion of plaintiff's rights — these are the essential elements of the wrong. Courts recognize this, but, feeling in most cases that this is not a sufficient ground for equity to intervene, they strain to find another ground for relief. Then, in effect, they enjoin the trade libel while saying that it is incidental to the granting of other relief. It would be much simpler and more straightforward if equity recognized that a continuing product disparagement gives rise to an injury that has no remedy other than an injunction, and directly granted this relief for trade libel.[31]

29. Carter v. Knapp Motor Co., 243 Ala. 600, 11 So. 2d 383 (1943); West Willow Realty Corp. v. Taylor, 23 Misc. 867, 198 N.Y.S.2d 196 (Sup. Ct. 1960).

30. Commercial publications are not within the First Amendment protection of freedom of speech. Mutual Film Corp. v. Industrial Comm. of Ohio, 236 U.S. 230, 35 Sup. Ct. 387 (1914). This case has been overruled as to motion pictures because films now convey significant ideas. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 Sup. Ct. 777 (1956). It cannot be said that advertisements are significant media for the expression of ideas, so the *Mutual Film* doctrine is still applicable to them. But see, a recent California case, In re Schillaci, 30 U.S. L. Week 2233 (U.S. 1961), which held that a statute which prohibited most advertisements concerning venereal disease was unconstitutional as an abridgement of freedom of the press. The court discussed the recent Supreme Court decisions dealing with censorship but did not allude to the *Mutual Film* doctrine at all.

31. Note 21 *supra*. In Menard v. Houle, 298 Mass. 546, 11 N.E.2d 436 (1937) an injunction was allowed when a person painted a lemon on his car and parked it in front of an auto agency. The car owner had unjustly demanded that the dealer fix the car. In McMorries v. Hudson Sales Corp., 233 S.W.2d 938 (Tex. Civ. App. 1950) where there was no allegation of an unjustified demand to fix the car, an injunction was not allowed. How can this be logically explained to a merchant when the injury and the adverse effect on his business are the same in both cases? Pound, in *Equitable Relief Against Defamation and Injuries to Personalty*, 29 HARV. L. REV. 640 (1915) felt it would just be a matter of time before some strong court would recognize a cause of action in equity for trade libel.

III.

RULES OF EVIDENCE IN THE FEDERAL COURTS.

If there is the requisite diversity and a sufficient jurisdictional amount, then it is advisable to sue for a trade libel in the federal courts where less stringent rules of evidence have led to a more liberal granting of relief.

The jurisdictional amount is computed as the damages sought, when the suit is at law, or as the value of the right of the plaintiff to conduct his business[32] or the value of the good will that is being injured,[33] when the suit is for an injunction. While one must still prove special damages, the evidentiary requirements are not as strict as in the state courts. Showing the names of lost customers is still the preferable means of proving special damages, but if that is not possible then proof of a general loss of business has been held sufficient.[34] In anti-trust actions, federal courts have shown an increased tendency to allow surveys and market samplings into evidence to show the amount of sales lost by the plaintiff as a result of the monopolistic practices of the defendant.[35] These surveys are used to show the demand that there would have been for the product or service if there had been no interference by the defendant. Also, federal courts allow these market samplings to be accepted as evidence of loss of business in an action for disparagement. In the states which require strict proof of loss of customers, an argument that market surveys based on scientific samplings are accurate barometers of lost business and are acceptable in federal courts, may convince the state court that such is sufficient proof of special damage.[36] It is clear that the climate in the federal courts is based on a more realistic appraisal of the limitations of evidence in proving loss of customers.

The federal courts have also shown more sympathy to the plight of the disparaged plaintiff in equity. While state law is controlling since jurisdiction is based on diversity, federal judges have tended to use their discretion more freely in deciding that the state court would have issued an injunction, once any other head of equity jurisdiction has been shown.[37]

32. Everson v. Spaulding, 150 Fed. 517 (9th Cir. 1907).

33. Bourjois, Inc. v. Park Drug Co., 82 F.2d 468 (8th Cir. 1936).

34. "Where it is not possible for the plaintiff to specify the particular customers lost, special damages for general loss of custom may be recovered." Erick Bowman Remedy Co. v. Jensen Salsbery Laboratories, Inc., 17 F.2d 255, 260 (8th Cir. 1926).

35. *E.g.*, Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416 (10th Cir. 1952). In FTC actions concerning false and misleading advertising surveys are admitted to prove whether a term is capable of deceiving members of the public. Arrow Metal Products Corp. v. FTC, 249 F.2d 83 (3d Cir. 1957).

36. It should be remembered that a survey is only as good as the pollsters and the questions asked. One should be prepared to show that the survey he is seeking to have admitted is taken by a reputable firm and is completely objective and based on validated principles.

37. Black & Yates v. Mahogony Assoc., 129 F.2d 227 (3d Cir. 1941), *cert. denied*, 317 U.S. 672, 63 Sup. Ct. 76 (1942); Paramount Pictures, Inc. v. Leader Press, Inc., 106 F.2d 229 (10th Cir. 1939); Royer v. Stoody Co., 192 F. Supp. 949 (W.D. Okla. 1961).

IV.

UNFAIR COMPETITION.

Trade libels are also enjoinable in an action for unfair competition. This cause of action, the outer limits of which are still undefined, is growing rapidly in popularity and is probably being applied prospectively by the federal courts (where the actions have usually been brought) based on an educated guess as to what the respective state courts would do when faced with the same situation.[38] Naturally, this remedy is limited to trade libels uttered by a competitor and thus not every disparagement of a product can be so redressed. Under this theory of action, any slander, defamation, or false or misleading representation as to a product made by a competitor can be enjoined.[39] The growing scope of this cause of action,[40] together with the elimination of the problems of proof encountered in an action to enjoin a trade libel, make this a most attractive form of relief when competitive products are involved.[41] The development of this remedy is a recognition by the courts that any sustained campaign against the quality of a product is not a fair method of competing for the attention of the buying public and cannot help but injure that product. To allow unbridled competition in this area would result in chaos with so many claims and counter-claims being bandied back and forth that they would confuse rather than enlighten the public.

Another weapon in the arsenal of remedies against trade libel is the Federal Trade Commission's cease and desist order which is enforceable only in the federal courts. This remedy is limited, however, in that an individual cannot institute the proceeding. Although an individual can register a complaint with the Federal Trade Commission in order to set the federal machinery into motion, there can be no recovery of damages, and the FTC is itself limited to overseeing practices which affect or occur in interstate commerce. Moreover, in delimiting the jurisdiction of the FTC, the federal courts have narrowly construed the meaning of interstate commerce.[42]

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38. Eversharp, Inc. v. Pal Blade Co., 182 F.2d 779 (2d Cir. 1950).

39. Gardella v. Log Cabin Products Co., 89 F.2d 891 (2d Cir. 1937); Kemert Corp. v. Printing Arts Research Laboratories, Inc., 269 F.2d 375 (9th Cir. 1959); Bourjois, Inc. v. Park Drug Co., 106 F.2d 229 (10th Cir. 1939).

40. Wolff, *Unfair Competition by Truthful Disparagement,* 47 YALE L.J. 1304 (1938).

41. In an action for unfair competition there is no problem of showing an intent to disparage or malice. Bourjois, Inc. v. Park Drug Co., 106 F.2d 229 (10th Cir. 1939).

42. FTC v. Bunte Bros., 312 U.S. 349, 61 Sup. Ct. 580 (1941).

V.

FOREIGN VIEWS CONCERNING TRADE LIBEL.

The development of a cause of action for damages in England has paralleled that in the United States.[43] To recover for a trade libel in England, plaintiff must prove the falsity of the statement, malice and special damages.[44] But under the Defamation Act of 1952[45] the requirement of proof of special damage is abrogated when the trade libel is made to cause damage to a business. The English law regarding injunctions, however, differs widely from the American view. Under the Judicature Act of 1873, the courts had no problem in finding jurisdiction to enjoin a trade libel.[46] But in order for the courts to exercise this power, a showing of special damage and proof of the elements needed to recover at law were required.[47] Since the Defamation Act of 1952 abolishes the requirement of special damages at law, it appears that an injunction could now also be issued without proof of special damages to one who qualifies under this act.[48] In Canada, special damages must be shown to recover at law but in equity a showing of actual damages appears to be sufficient to merit an injunction.[49]

The law on the continent in France and Germany has dealt with trade libels solely on the ground of unfair competition. These countries go so far as to enjoin *any* advertising which mentions the product of another directly or by implication, regardless of whether the statement is true or false.[50] They feel that a comparison by a competitor puts him in the position of a judge of his own cause and is thus unfair, since there are no uniform standards for appraisal of the quality of an article. Moreover, the public is not in a position to verify the truth or falsity of the statements made.[51]

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43. GATLEY, LIBEL AND SLANDER 143-150 (5th ed. 1960).

44. Western Counties Manure Co. v. Lawes Chemical Manure Co., [1874] L.R. 9 Ex. 218.

45. 15 & 16 Geo. 6 & 1 Eliz. 2, c. 66:

Sect. 3. In an action for slander of goods . . . , it shall not be necessary to allege or prove special damage.

(b) if the words are calculated to cause pecuniary damage to the plaintiff in respect of any . . . business held or carried on by him at the time of the publication.

There have been no cases in England construing this statute but from its wording, it seems clear that special damages need not be alleged in a suit to recover for a trade libel.

46. Thomas v. Williams, [1880] 14 Ch. D. 864.

47. White v. Mellin, [1895] A.C. 154.

48. GATLEY, LIBEL AND SLANDER 631-32 (5th ed. 1960).

49. Wood, *Disparagement of Title and Quality*, 20 CAN. BAR REV. 296, 430 (1942).

50. Wolff, *Unfair Competition by Truthful Disparagement*, 47 YALE L.J. 1304 (1938).

51. Reichsgericht II Z.S. Nov. 25, 1932, nw. 33, 71, as found in Wolff *supra* note 50 at pp. 1317-18.

VI.

SUMMARY.

While the remedy at law for trade libel has shown some signs of becoming more liberal, there is still a lack of a proper remedy in most states for this injury. The strict requirements of proof of loss should be liberalized along the lines outlined above, so that one truly injured in his business through a disparagement can recover damages for his loss. The remedy in equity, while adequate in that it affords relief in all properly pleaded cases, still requires the use of roundabout methods in most jurisdictions to obtain relief. Trade libel should be recognized as a separate cause of action in equity as a few progressive courts have done already. In the narrower field of trade libel by a competitor, the action of unfair competition is an adequate safeguard in so far as it protects against continuing false statements, but it is submitted that it should be expanded to cover even true statements about quality made in comparison with other specific products because of the inherently misleading nature of such comparisons.[52] The relief afforded for trade libel has come a long

52. The advertising industry, groups of retailers, groups of broadcasters and governing authorities over broadcasting have recognized the unfairness of comparative advertising and have promulgated clauses against it in their respective codes of practice. THE STANDARDS OF PRACTICE OF THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, (1956); THE TELEVISION CODE OF THE NATIONAL ASSOCIATION OF BROADCASTERS, (5th ed. 1959). In England the Independent Television Authority bans all commercials which appear to compare the product advertised with one or more of its rivals, ADVERTISING AGE, Mar. 13, 1961, p. 54.

The question naturally arises of whether the courts of this country should go so far as to enjoin all comparative advertising. It is a wise policy not to allow recovery of *damages* for all comparative advertising. But the issuance of an injunction stands on a different footing. In equity, even if the statements are true, comparative advertising of facts not readily verifiable could be enjoined without any determination of which competitor had the better product. This would be desirable. Every comparison implies that one of the two things compared is inferior to the other and hence should not be bought. Also, many truthful statements can be put in a misleading way so that they appear to degrade the compared product. For example, one could say that brand *X* does not contain a certain ingredient that brand *Y* does, thus implying that brand *X* is inferior, while in fact that ingredient may have no bearing on the quality of the product. Moreover, products are used by many different people in many different ways and under varied circumstances, so that a product that is best for one use is not necessarily best for another. Finally, the seller or manufacturer who wants to distribute his product seldom has the objectivity required to make a meaningful comparison and thus will only tend to mislead the consuming public.

Actually from the standpoint of the advertiser himself, it should appear that comparative advertising is often a poor policy. The mere fact that the rival's product is mentioned gives it exposure before the public which it ordinarily would not have. This exposure may lead to one of two possible unfavorable reactions on the part of the consumer. It may prompt him, out of curiosity or even perversity, to either examine or buy the disparaged product to see if it is really as inferior as the advertisement claims. It may also in some cases prompt the consumer to buy the product on the theory that if the competitor picked this one manufacturing rival to disparage from among all competitors in his field, this product is probably better than the advertiser's. Comparison of products often degenerates into a mudslinging contest which is subversive of the very object of advertising — to inform the public as to the existence and quality of the product.

To be balanced against the disadvantages of comparative advertising is a consideration of the fact that if a person has a superior product he should have a

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way in this century and adequately prevents future harm, but it is still deficient in recompensing past harm. The continued expansion of this cause of action may well depend on the advertising industry itself. If advertising copy is kept moderate then judicial control will probably not be imposed, but if the industry cannot control itself then judicial sanctions should be expanded to prevent and compensate for the abuse of one of the tools that contributes to the prosperity of the economy.

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right to tell the public about it. But the manufacturer has ways other than by degrading his competitors by which he can put his message before the public effectively. Since there is no objective standard to test quality, it is submitted that all comparative advertising as to quality should be enjoined as unfair competition, even though the statements may be true.