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LIBEL AND SLANDER - DEFAMATION BY RADIO - ABSOLUTE LIABILITY OF BROADCASTING COMPANY

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LIBEL AND SLANDER — DEFAMATION BY RADIO — ABSOLUTE LIABILITY OF BROADCASTING COMPANY — The defendant broadcasting company leased its facilities to a commercial advertising corporation for the transmission of a series of sponsored radio programs. During the course of one of these broadcasts a comedian, employed by the advertiser, suddenly interpolated an extemporaneous remark, "That's a rotten hotel," in reference to plaintiff's hotel. A script for each program was prepared in advance, submitted to the defendant for approval, and followed exactly by the performers. The interjection in question did not appear in the script and had not been made at rehearsal. Plaintiff brought trespass for defamation, and from a judgment on a verdict for the plaintiff, defendant appealed. *Held*, the court below erred in failing to direct a verdict for defendant, since defamation by radio constitutes a new tort to which the rules of absolute liability employed in the field of libel and slander are inapplicable. *Summit Hotel Co. v. National Broadcasting Co.*, (Pa. 1939) 8 A. (2d) 302.

The new and expanding field of radio defamation presents as yet but a paucity of case precedent, with the result that the developing law thereon has been based generally upon the fundamental principles of libel and slander governing analogous situations. Courts have variously classified radio defamation as libel,[1] slander,[2] and a new and distinct tort.[3] There is merit in a suggested distinction between defamatory statements read from a program script (libel) and extemporaneous remarks interpolated by the defendant (slander).[4] But the court in the principal case chose to avoid the difficulties which would necessarily arise in drawing analogies from libel and slander cases by adopting the theory that radio defamation is a new kind of tort. Defamation may be intentional, negligent, or without fault, with recovery permitted in each instance under proper conditions.[5] In the principal case, the defendant company was guilty neither of wrongful intent nor of negligence in the publication of the defamatory remark, and hence could have been held only on the basis of absolute liability. Authority for the application to this type of case of this doctrine is predicated chiefly upon the analogy [6] of absolute liability of the press.[7] Publishers of news-

[1] Sorenson v. Wood, 123 Neb. 348, 243 N. W. 82 (1932); Miles v. Louis Wasmer, Inc., 172 Wash. 466, 20 P. (2d) 847 (1933); Singler v. Journal Company, 218 Wis. 263, 260 N. W. 431 (1935).

[2] Meldrum v. Australian Broadcasting Co., [1932] 38 Vict. L. R. 432.

[3] See 12 ORE. L. REV. 149 (1933).

[4] 2 SOCOLOW, THE LAW OF RADIO BROADCASTING, § 468 (1939). See also 3 TORTS RESTATEMENT, § 568 (1938). This problem becomes material, of course, only in determining whether or not words are actionable per se. The court in the principal case assumed for the purposes of argument that the words therein were so actionable.

[5] Peck v. Tribune Co., 214 U. S. 185, 29 S. Ct. 554 (1909).

[6] Haley, "The Law on Radio Programs," 5 GEO. WASH. L. REV. 157 at 186-187 (1937), expresses the analogy thus: "the newspaper prints the defamatory words on paper, the broadcasting station impresses the sound waves on the electrical carrier wave; the newspaper arranges the type and inks the rolls, the station arranges the microphones and continually readjusts the modulation on the carrier. . . . the newspaper sells space, and the broadcasting company sells time."

[7] Coffey v. Midland Broadcasting Co., (D. C. Mo. 1934) 8 F. Supp. 889;

papers have been repeatedly held liable for the circulation of unprivileged defamatory remarks appearing in their publications even though in complete ignorance of the contents thereof.[8] The analogy is weak, however, because of the inability of radio stations to edit extemporaneous remarks, bar "ad libbing," or delete defamatory expressions after they have been released. It is understandable, therefore, that this tie-up between ink and air has induced extensive comment.[9] It is urged that the strict law of libel has been extended to pictures,[10] and to motion pictures,[11] and should hence be stamped upon radio, regardless of differentiating circumstances.[12] Those who oppose absolute liability stress the alleged analogies of telephone companies,[13] telegraph companies,[14] and news vendors who disseminate libellous matter without knowledge.[15] It would seem that the many separate situations presented as radio defamation should not be shoved indiscriminately into one category, but should rather be diagnosed individually, with absolute liability imposed where it appears most applicable. Thus, where the defamatory words are uttered by a network employee[16] either within or without the script,[17] or are read by an employee of the lessee of the broadcasting company from a script previously submitted,[18] the broadcasting company might well be held absolutely liable.[19] But where, as in the instant case, the de-

Sorenson v. Wood, 123 Neb. 348, 243 N. W. 82 (1932); Miles v. Louis Wasmer, Inc., 172 Wash. 466, 20 P. (2d) 847 (1933).

[8] Peck v. Tribune Co., 214 U. S. 185, 29 S. Ct. 554 (1909).

[9] 2 SOCOLOW, THE LAW OF RADIO BROADCASTING, § 474 (1939); 3 TORTS RESTATEMENT 192 (1938); Haley, "The Law on Radio Programs," 5 GEO. WASH. L. REV. 157 at 187 (1937); Nash, "The Application of the Law of Libel and Slander to Radio Broadcasting," 17 ORE. L. REV. 307 at 309 (1938); Sprague, "Freedom of the Air," 8 AIR L. REV. 30 at 44 (1937); 46 HARV. L. REV. 133 (1932); 18 CORN. L. Q. 124 (1932); 7 So. CAL. L. REV. 346 (1934).

[10] Peck v. Tribune Co., 214 U. S. 185, 29 S. Ct. 554 (1909).

[11] Merle v. Sociological Research Film Corp., 166 App. Div. 376, 152 N. Y. S. 829 (1915). Cf. 81 UNIV. PA. L. REV. 228 (1932).

[12] In general, see Haley, "The Law on Radio Programs," 5 GEO. WASH. L. REV. 157 (1937).

[13] Vold, "The Basis for Liability for Defamation by Radio," 19 MINN. L. REV. 611 at 648 (1935).

[14] Nye v. Western Union Tel. Co., (C. C. A. 7th, 1900) 104 F. 628; Western Union Tel. Co. v. Cashman, (C. C. A. 5th, 1906) 149 F. 367; 29 MICH. L. REV. 339 (1931); Vold, "The Basis for Liability for Defamation by Radio," 19 MINN. L. REV. 611 at 652 (1935).

[15] See: Vizetelly v. Mudie's Library, [1900] 2 Q. B. 170; Vold, "The Basis for Liability for Defamation by Radio," 19 MINN. L. REV. 611 at 657 (1935).

[16] The doctrine of respondeat superior imposes upon the station full liability.

[17] See Pollasky v. Minchener, 81 Mich. 280, 46 N. W. 5 (1890).

[18] See 2 SOCOLOW, THE LAW OF RADIO BROADCASTING, § 476 (1939), to the effect that the broadcasting company is under a duty to require all scripts to be submitted for approval.

[19] Close examination of the decisions covering these situations discloses that the courts often base their conclusions upon the rule of absolute liability when the facts

famatory remark is interpolated by an employee of the lessee in departure from a previously submitted script, the impression of absolute liability upon the broadcasting company would seem entirely too severe.[20] Only one court has championed this harsh rule.[21] The circumstances closely parallel those surrounding the broadcast of a sports event, political convention, parade, or other program where instant dissemination of news is essential, and absolute liability would decidedly reduce the efficiency of coverage. The court in the principal case, in recognition of the factors setting radio defamation apart as a distinct tort, considered the problem de novo and concluded that the extension of the doctrine of absolute liability to cover this type of case could not be countenanced.[22] Prior to this decision, a leading text-writer had expressed the opinion that legislation would be required to achieve this desirable result.[23] That the first court squarely to face the issue took the step of its own accord is significant in giving promise that future courts will continue to recognize the separability of radio from other kinds of defamation and will apply legal doctrine most conducive to the realization of a high degree of radio integrity without over-restriction.

might well have supported a finding of negligence. Cf. Sorenson v. Wood, 123 Neb. 348, 243 N. W. 82 (1932), and Miles v. Louis Wasmer, Inc., 172 Wash. 466, 20 P. (2d) 847 (1933).

[20] "In such a situation, the writer believes the only fair rule to be a requirement that the station observe the standard of due care." 2 SOCOLOW, THE LAW OF RADIO BROADCASTING 863 (1939).

[21] In response to an assumed fact situation "on all fours" with the principal case, the court resolved: "The conclusion seems inescapable that the owner of the station is liable." Coffey v. Midland Broadcasting Co., (D. C. Mo. 1934) 8 F. Supp. 889 at 890.

[22] If, as has been said, the broadcaster is a publisher and can avoid absolute liability only on the ground of privilege, an identical result compatible with pre-existing law on defamation might be reached through creation of a qualified privilege to cover situations of the nature of that faced by the Pennsylvania court here.

[23] 2 SOCOLOW, THE LAW OF RADIO BROADCASTING 477 (1939). Cf. Sprague, "Freedom of the Air," 8 AIR L. REV. 30 at 44 (1937). One state, Iowa, statutorily exempts a station from liability where due care is used. Iowa Laws (1937), c. 238, § 1.