

Radio and TV Defamation: "Fault" Or Strict Liability?

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An examination of writings and books¹ dealing specially with radio and television law will show that most areas of that law are primarily statutory or administrative. The scientific newness of the mechanical devices involved, and the social newness of the problems presented by them as modes of mass communication, made it imperative that new and appropriate rules of law, both substantive and procedural, be devised to govern them. Common law rules formulated to control simpler modes of communication, even such as great city newspapers and national magazines,² were quickly recognized as not even relevant to many of the problems posed by the new airborne mediums. The vast audiences reached by them, the obvious necessity for traffic regulation among the air waves if anything like maximum use was to be achieved, and a score of other considerations quickly produced studies, both within the industry and outside it, which led to enactments and regulations³ that have little similarity to the common law of the past.

In one vastly important area, however, this development did not immediately occur. In respect to defamation and related torts few new enactments found their way onto the books, in the early days of radio, and the courts fell back on the old concepts for guidance. Had these common law concepts been intelligently and sys-

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¹ E.g., WARNER, *RADIO AND TELEVISION LAW* (2 vols., 1948, with 1952 Supp.); MOSER AND LAVINE, *RADIO AND THE LAW* (1947); SOCOLOW, *THE LAW OF RADIO BROADCASTING* (2 vols., 1939).

² It is interesting that the growth of mass circulation magazines and newspapers, particularly in the United States, has not produced any great body of new regulatory law such as has often accompanied striking new economic developments in our society. Probably their closeness to the basic constitutional guaranties of the Bill of Rights, particularly that of a free press, furnishes the explanation for this phenomenon. Cf. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (tax on sale of advertising). But see *Associated Press v. Natl. Labor Relations Board*, 301 U.S. 103 (1937) (rights of employees under Natl. Labor Relations Act).

³ THE RADIO ACT OF 1927, 44 STAT. 1162-1174, superseded by the COMMUNICATIONS ACT OF 1934, 48 STAT. 1102 *et seq.*, which, with amendments, is now 47 U.S. C. §§ 151-609, was the principal enactment. A mass of regulations has been issued by the Federal Communications Commission under authority of the Act. See 47 CODE FED. RECS. (1949) 861 pages; Pocket Supp. (1952) 676 pages; newer regulations printed in the Federal Register. Federal regulatory power under these statutes has been sustained. *Natl. Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

tematically worked out and reasonably suited to the fairly complex society of the late pre-radio period of our civilization, the result might not have been wholly unsatisfactory. But it is doubtful if any major segment of the common law is more medieval in its point of view, more beset by circuitous fictions and uncertain vagaries,⁴ than is the law of libel and slander. Yet that was the law which in general was applied at the beginning to defamation problems in radio and television.

One consequence which may be largely but not altogether good is that self-policing rather than regulation by the law became the common practice in the industry. The number of defamation cases that have gone to the courts from radio and television is amazingly small. Insofar as this indicates a self-regulating avoidance of wrongdoing it is wholly praiseworthy. But the nature of the activity is such that it may also indicate censorship, an interference with free expression in marginal situations in which the interests of society might be better served by publication than by silence or emasculated wordings. Broadcasting companies protecting themselves against legal liability when the law is not clear may lean over backward to prevent the making of statements that might be permissible under a law that was clearer, or might even deliberately use the uncertainty of the law as an excuse for censoring materials which for other reasons they disliked.

One of the first problems to arise in the radio defamation field, one still not satisfactorily answered, is whether "fault"⁵

⁴ "The anomalies and absurdities of this branch of the law have been exposed time and time again by able legal writers but an almost incredible legislative and judicial inertia have preserved a mausoleum of antiquities peculiar to the common law and unknown elsewhere in the civilized world." Donnelly, *The Right of Reply*, 34 VA. L. REV. 867, 870 (1948). "No branch of the law has been more fertile of litigation than this . . . , nor has any been more perplexed by minute and barren distinctions." POLLOCK, *TORTS* 237 (12th ed., 1923). "Unfortunately the English law of defamation is not the deliberate product of any period. It is a mass which has grown by aggregation, with very little intervention from legislation, and special and peculiar circumstances have from time to time shaped its varying course. The result is that perhaps no other branch of the law is as open to criticism for its doubts and difficulties, its meaningless and grotesque anomalies. It is, as a whole, absurd in theory, and very often mischievous in its practical operation." Van Vechten Veeder, *The History of the Law of Defamation*, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 446 (1909). And see Leflar, *Legal Remedies for Defamation*, 6 ARK. L. REV. 423 (1952).

⁵ It is of course recognized that "fault" when based on a finding of a defendant's negligence is often an artificial thing, whether it be attributed to the defendant by *respondere superior* on account of an employee's conduct or be discovered with the aid of some procedural rule like *res ipsa loquitur* designed to aid plaintiffs when evidence is hard to get. See EBRENZWEIZ, *NEGLIGENCE WITHOUT FAULT* (1951); Prosser, *Nuisance Without Fault*, 20

should be a prerequisite to broadcaster liability. The law of libel and slander for the most part grew up outside the standard tort concepts of intended wrongdoings and negligence. It is ordinarily thought of as a body of law grounded on "absolute liability" in the sense that state of mind accompanying the making of a libelous statement is irrelevant except on corollary issues.⁶ Newspaper cases illustrate this. Publication of a plaintiff's picture by mistake as the picture of another,⁷ the accidental juxtaposition of initials so as to name the plaintiff when a third person was intended,⁸ the innocent use of harmless words which because of an unknown context are damaging to a plaintiff,⁹ all regularly result in recoveries. Negligence may be present in such cases, but it is not inquired about. It is enough that the defamatory matter was published. Should the same strict rule be applied against broadcasters?

The early cases said that it should be. *Sorensen v. Wood*¹⁰ from Nebraska set the pattern. One Wood read defamatory remarks concerning plaintiff in a political speech delivered over defendant's radio station. Defendant assumed that under federal law¹¹ the speech could not be censored, and the Court without deciding that point concluded that an instruction was erroneous which made the station's liability depend on whether it "honestly and in good faith exercised due care." The Court treated the problem as one of libel rather than slander, cited newspaper cases such as those just referred to, then stated that the same principles should apply to radio defamation.

... like most radio broadcasters, (defendant) is to a large extent engaged in the business of commercial advertising for pay. It may be assumed this is sufficient, not only to carry its necessary large overhead, but to make at least a fair return on its investment. For it appears that the opportunities are so attractive to investors that the avail-

TEXAS L. REV. 399 (1942); Leflar, *Negligence in Name Only*, 27 N.Y.U.L. Q. REV. 564 (1952). But even though "fault" be partly a fictional concept, it restricts recoveries more narrowly than does the concept of absolute liability.

⁶ Such as damages, PROSSER, TORTS 816 (1941); and defeating conditional privilege, *id.*, 849.

⁷ *Peck v. Tribune Co.*, 214 U.S. 185 (1909); *Petransky v. Repository Ptg. Co.*, 51 Ohio App. 306, 200 N.E. 647 (1935).

⁸ *Washington Post Co. v. Kennedy*, 3 F.2d 207, 41 A.L.R. 483 (App. D.C. 1925). Cf. *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 34 N.E. 462 (1893).

⁹ *E. Hulton & Co. v. Jones*, [1910] A.C. 20; *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 126 N.E. 260, 10 A.L.R. 662 (1920). The same rule has been applied to an agency which mailed out defamatory advertising matter prepared by another. *McDonald v. R. L. Polk & Co.*, 346 Mo. 615, 142 S.W. 2d 635 (1940).

¹⁰ 123 Neb. 348, 243 N.W. 82, 82 A.L.R. 1098 (1932); *appeal dismissed*, 290 U.S. 599 (1933).

¹¹ RADIO ACT OF 1927 § 18, 44 STAT. 1162 (1927), discussed, *infra*, n. 27.

able airways would be greatly overcrowded by broadcasting stations were it not for restriction of the number of licenses under federal authority. Such commercial advertising is strongly competitive with newspaper advertising because it performs a similar office between those having wares to advertise and those who are potential users of those wares. . . . It competes with newspapers, magazines and publications of every nature.¹²

This was partly an argument against favoritism as between radio and newspapers, and partly an economic argument advocating loss distribution in keeping with ability to bear the loss.

For some years the courts of other states¹³ tended to accept the Nebraska court's analysis, despite some criticism of it by legal writers.¹⁴ The RESTATEMENT OF TORTS, promulgated in 1938, stated the problem but refused to take a position on it,¹⁵ on the ground that relevant considerations had not yet been fully developed. Then in 1939, in *Summit Hotel Co. v. National Broadcasting Co.*,¹⁶ the Pennsylvania Supreme Court re-examined the issue completely and reached the opposite result. The case had no political implications; the entertainer Al Jolson, employed not by the defendant broadcaster but rather by the advertiser who was leasing time for the program, interpolated the words "That's a rotten hotel" (referring to plaintiff's hostelry) into an otherwise innocent written script that had been submitted to and approved by defendant in advance.¹⁷ Several special considerations aided the court

¹² Sorensen v. Wood, *supra*, note 10.

¹³ *Coffee v. Midland Broadcasting Co.*, 8 F. Supp. 889 (W.D. Mo. 1934); *Irwin v. Ashurst*, 158 Ore. 61, 74 P. 2d 1127 (1938); *Miles v. Louis Wasmer, Inc.*, 172 Wash. 466, 20 P. 2d 847 (1933). And see *Singler v. Journal Co.*, 218 Wis. 263 260 N.W. 431 (1935). This result was actively aided by the vigorous support accorded the result by Vold, *The Basis for Liability for Defamation By Radio*, 19 MINN. L. REV. 611 (1935). Professor Vold in fact had filed a brief *amicus curiae* for the winning side in the case. Keller, *Federal Control of Defamation by Radio*, 12 NOTRE DAME L. REV. 15, 134 (1936-37), also supported the *Sorensen v. Wood* view.

¹⁴ Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 725, 729-31 (1937); Sprague, *Freedom of the Air*, 11 AIR L. REV. 17 (1940); Farnham, *Radio Defamation and the American Law Institute*, 16 B.U.L. REV. (1936); Haley, *The Law on Radio Programs*, 5 GEO. WASH. L. REV. 157, 171 (1937); Guider, *Liability for Defamation in Political Broadcasts*, 2 J. RADIO LAW 708 (1932); Royce, *Defamation by Radio*, 1 OHIO ST. L. J. 180 (1935). And see Committee Report, 57 A.B.A. REP. 423, 445 (1932).

¹⁵ RESTATEMENT, TORT, §§ 577 (*caveat*), 581, Comment f. (1938). See Farnham, *Radio Defamation and the American Law Institute*, *supra* n. 14.

¹⁶ 336 Pa. 182, 8 A. 2d 302, 124 A.L.R. 968 (1939).

¹⁷ "The interjected remark was made without warning; it did not appear in the script, had not been made at rehearsal, and defendant did not know the words were to be used . . . (and) had no opportunity to prevent the interjection." *Id.*

in rejecting the precedent afforded by the Nebraska case. For one thing, Pennsylvania had never accepted the theory of absolute liability, either in *Rylands v. Fletcher*¹⁸ situations or as applied to newspaper publications of libels.¹⁹ For another, Pennsylvania pleading required that the action be brought as one for trespass, rather than for either libel or slander as such, which enabled the court to classify radio defamation as a new tort, neither slander nor libel,²⁰ having its own characteristics and governed by new rules of law, so that the newspaper libel cases from other jurisdictions should not be deemed applicable to it, at least in that state. As to this new tort of radio defamation, the court felt free to lay down whatever rule best fitted the social factors inherent in it and the public policies to be served by the new medium of communication. The conclusion was that there should be no liability on the broadcasting company if "it exercised due care in the selection of the lessee, and, having inspected and edited the script, had no reason to believe an extemporaneous defamatory remark would be made. Where the broadcasting company's employee or agent

¹⁸ L.R. 1 Exch. 265 (1866), *aff'd*, L.R. 3 H.L. 330 (1868). On this case, see Thayer, *Liability Without Fault*, 29 HARV. L. REV. 801 (1916); Bohlen, *The Rule in Rylands v. Fletcher*, 59 U. OF PA. L. REV. 298 (1911).

¹⁹ "... our rule is not one of absolute liability, but rather, of a very strict standard of care to ascertain the truth of the published matter." *Summit Hotel Co. v. Natl. Broadcasting Co.*, *supra* n. 16.

²⁰ The courts have been uncertain whether radio defamation should be classified as libel or slander. An early leading case, *Meldrum v. Australian Broadcasting Co.*, (1932) Vict. L. R. 425, held that all radio defamation was slander rather than libel, even though read from a script, since it reached the public through spoken words. Broadcasters generally urged this view, since it is more difficult to establish that slander is actionable *per se*. Compare *Sorensen v. Wood*, *supra*, n. 10. The New York courts have taken the view that broadcast defamation read from a script is libel whereas if it is extemporaneous or interpolated it is slander. *Hartman v. Winchell*, 296 N.Y. 296, 73 N.E. 2d 30, 171 A.L.R. 759 (1947) (read from script; libel); *Locke v. Gibbons*, 164 Misc. 877, 299 N.Y. Supp. 188 (1937) (oral interpolations; slander); *Remington v. Bentley*, 88 F. Supp. 166 (S.D. N.Y. 1949) (extemporaneous television broadcast; slander). And see *Landau v. Columbia Broadcasting System, Inc.*, 128 N.Y.S. 2d 254 (Supr. Ct., Trial T., 1954). A realistic criticism of this traditionalistic and artificial analysis appears in the concurring opinion of Fuld, J., in *Hartman v. Winchell*, *op. cit.* The nature and extent of publication by radio and television make the defamation almost always as serious as if it were written. It seems preposterous to apply to this medium, merely because it employs oral speech, rules that were devised to fit the problem presented by spoken communications, called slander, two or three centuries ago. See Donnelly, *Defamation by Radio: A Reconsideration*, 34 IOWA L. REV. 12 (1948); Barry, *Radio, Television and the Law of Defamation*, 23 AUSTR. L. J. 203 (1949); Notes, 47 COL. L. REV. 1075 (1947), 23 CORN. L. Q. 494 (1938), 45 MICH. L. REV. 645 (1947), 12 MO. L. REV. 361 (1947), 25 N.Y.U. L. Q. REV. 416 (1950), 86 U. OF PA. L. REV. 312 (1938), 26 TEX. L. REV. 221 (1947).

makes the defamatory remark, it is liable, unless the remarks are privileged and there is no malice."^{20a}

Nine years later the New Jersey court gave essentially the same answer to the problem as did Pennsylvania, rejecting absolute liability and concluding that the station operator "is not liable for a defamatory statement during a radio broadcast by the person hired by the lessees and not in the employ of the radio broadcasting company, the words being carried to the radio listeners by its facilities, if it could not have prevented publication by the exercise of reasonable care."²¹ Principal reliance was placed upon an analogy to so-called "disseminators," identified as booksellers, news stand operators, newspaper and magazine distributors, librarians and the like.²²

The fairly well-accepted rule as to such "disseminators" is that they will not be liable for defamatory statements contained in materials sold or circulated by them unless they have been guilty of some fault, approximating negligence, in failing to discover the de-

^{20a} A Pennsylvania statute, enacted in 1901, would have appeared to have some bearing on the case. It provides: "In all civil actions for libel, no damages shall be recovered unless it is established to the satisfaction of the jury, under the direction of the court as in other cases, that the publication has been maliciously or negligently made, but where malice or negligence appears such damages may be awarded as the jury shall deem proper." Perhaps the court's reason for not citing the statute was that it referred expressly to libel, whereas the court preferred to put its decision on a ground applicable to the new tort of "radio defamation," which was deemed different from either libel or slander as such.

²¹ *Kelly v. Hoffman*, 137 N.J.L. 695, 61 A. 2d 143 (1948). See Notes, 1 *BAYLOR L. REV.* 371 (1950); 47 *MICH. L. REV.* 722 (1949); 2 *OKLA. L. REV.* 257 (1949); 6 *WASH. & LEE L. REV.* 259 (1949).

²² As might have been expected, writers and commentators continued to take sides as between the two views. (Cf., *supra*, notes 13, 14.) Vold, *Defamatory Interpolations in Radio Broadcasts*, 88 *U. OF PA. L. REV.* 249 (1940) was quite critical of the *Summit Hotel Co.* decision; rebuttal was undertaken in Seitz, *Responsibility of Radio Stations for Extemporaneous Defamation*, 24 *MARQ. L. REV.* 117 (1940), and this was followed by Vold, *Extemporaneous Defamation: A Rejoinder*, 25 *MARQ. L. REV.* 57 (1941). The newer view was again supported in Sprague, *More Freedom of the Air*, 11 *AIR L. REV.* 17 (1940), and was opposed by Donnelly, *Defamation by Radio: A Reconsideration*, 34 *IOWA L. REV.* 12 (1948) (supporting absolute liability), and Remmers, *Recent Trends in Defamation by Radio*, 64 *HARV. L. REV.* 727, 756 (1951). It has been said that the radio analogy to absolute liability on newspapers "has been properly subjected to criticism by almost every legal commentator." *Summit Hotel Co. v. Natl. Broadcasting Co.*, 336 Pa. 182, 194, 8 A. 2d 302, 308, 124 *A.L.R.* 968, 976 (1939). But this is scarcely borne out by analysis of the comments. Among responsible writers the division is approximately equal. The two leading textbooks on radio law support the Pennsylvania-New Jersey view. 2 *SOCOLOW, THE LAW OF RADIO BROADCASTING* 858 (1939); 1 *WARNER, RADIO AND TELEVISION LAW* 444 (1948).

famatory statement before disseminating it.²³ It is said there is no liability "if he (the disseminator) can prove upon the trial to the satisfaction of the jury that he did not know the paper contained a libel; that his ignorance was not due to any negligence on his part; and that he did not know, and had no ground for supposing, that the paper was likely to contain libelous matter."²⁴ It is noticeable that under this statement the burden of proof is placed on the defendant. Substantially the same rule applies to telegraph companies transmitting apparently innocent messages,²⁵ with the additional protective possibility of sharing the sender's privileges, if any, as to non-innocent appearing messages.²⁶ News vendors and keepers of lending libraries cannot read all their magazines, newspapers and books before they sell or rent them, to see if there is libelous matter in them. Transmitters of messages have to take them as they come, except for obviously defamatory ones. Is there any sensible distinction between these unintentional publishers of libels, and radio or television broadcasters who publish unanticipated interpolations or practically uncensorable programs over their stations?

An additional factor which must be taken into account in one important broadcasting field is the federal regulation concerning political speeches or programs. This dates back to section 18 of the Radio Act of 1927, continued unchanged as section 315 of the Communications Act of 1934, and still operative today, with a minor addition made in 1952. Section 315 provides:

(a) If any licensee shall permit any person who is a legally qualified candidate for public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall

²³ RESTATEMENT, TORTS § 581 (1938); *Vizetelly v. Mudie's Select Library*, (1907) 2 Q.B. 170; *Hartman v. American News Co.*, 69 F. Supp. 736 (W.D. Wis. 1947), *aff'd*, 171 F. 2d 581 (7th Cir. 1949); *Staub v. Van Benthuyssen*, 36 La. Ann. 467 (1884); *Bowerman v. Detroit Free Press*, 287 Mich. 443, 283 N.W. 642, 120 A.L.R. 1230 (1939); *Balabanoff v. Fossani*, 192 Misc. 615, 81 N.Y.S. 2d 732 (1948).

²⁴ *Street v. Johnson*, 80 Wis. 455, 458, 50 N.W. 395, 396, 14 L.R.A. 203 (1891). Also see *McLeod v. St. Aubyn*, (1899) A.C. 549 (newspaper lender, same rule).

²⁵ *Nye v. W.U. Telegr. Co.*, 104 Fed. 628 (D. Minn. 1900); *Grisham v. W.U. Telegr. Co.*, 238 Mo. 480, 142 S.W. 271 (1911).

²⁶ *Lesesne v. Willingham*, 83 F. Supp. 918 (E.D. S. C. 1949); *W.U. Telegr. Co. v. Lesesne*, 198 F. 2d 154 (4th Cir. 1952), *cert. denied*, 344 U.S. 896 (1953); *Parker v. Edwards*, 222 N.C. 75, 21 S.E. 2d 876 (1942). A slightly more liberal rule is suggested by RESTATEMENT, TORTS § 612 (1938), and is approved in *O'Brien v. W.U. Telegr. Co.*, 113 F. 2d 539 (1st Cir. 1940). And see *Smith, Liability of a Telegraph Company for Transmitting a Defamatory Message*, 20 COL. L. REV. 30 (1930).

have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate.

(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.²⁷

This statute does not require radio and television stations to make their facilities available to all candidates; it merely provides that if facilities are made available to one candidate they must then be made equally available to other candidates for the same office, and that there may be no censorship of the material broadcast by either candidate. The statute has no applicability to appearances by supporters of candidates, as distinguished from the candidate themselves. Such supporters, whether they be campaign managers or mere volunteers, have no right to broadcasting time under section 315, and their proposed broadcasts may be censored just as other programs are.²⁸ Accordingly, the station's liability for defamatory statements in broadcasts by supporters is governed by the local law, whatever that may be,²⁹ unaffected by the federal enactment.

Even though a political speech be legally uncensorable because clearly covered by section 315, uncertainty remains as to whether the broadcasting station may not be liable for defamatory statements contained in it. If the jurisdiction be one like New Jersey³⁰

²⁷ RADIO ACT OF 1927 § 18, 44 STAT. 1162; COMMUNICATIONS ACT OF 1934 § 315, 48 STAT. 1088; amendment of July 16, 1952 added only the paragraph numbered (b) above; the section now appears in 47 U.S.C.A. § 315 (1953 Supp.). The Act is implemented by § 3.190 of the F.C.C. RULES AND REGULATIONS (AM radio); § 3.290 (FM radio); and § 3.657 (television). A pamphlet published by the Legal Department of the National Association of Radio and Television Broadcasters under the title A POLITICAL BROADCAST CATECHISM (2nd ed., 1954) gives to broadcasters that organization's interpretations of § 315 and the regulations issued under it, along with some very practical advice.

²⁸ *Felix v. Westinghouse Radio Stations, Inc.*, 186 F. 2d 1 (3rd Cir. 1951), cert. denied, 341 U.S. 909 (1952), reversing 89 F. Supp. 740 (E.D. Pa. 1950). The Court of Appeals recited at length the legislative history of § 315, showing conclusively that as enacted it was designed to apply to programs presented only by candidates themselves. The same history is set out in 1 WARNER, RADIO AND TELEVISION LAW 312 (1948), in slightly more detail.

²⁹ In the *Felix* case, *supra*, n. 28, this meant the application of the rule of the *Summit Hotel* case, *supra*, n. 16. But it was pointed out that, since § 315 was inapplicable, there may have been negligence in defendant, in failing to check the speech for defamatory content in advance of delivery, so that there might still be liability under the Pennsylvania rule.

³⁰ *Supra*, n. 21.

or Pennsylvania,³¹ requiring negligence or other fault as a prerequisite to station liability, there can be no recovery for section 315 programs unless station operators knew or had reason to anticipate that defamation would be included in a particular broadcast.³² But in jurisdictions holding to the absolute liability rule announced in Nebraska³³ there presumably is tort responsibility on broadcasters for defamations contained even in non-censorable speeches. This result is partly supported by an idea that even though the political content of the speech be not censorable there might be an advance station check on its purely defamatory content somehow conceived of as separable, and partly by the general theories that sustain liability without fault in other contexts.

That the Federal Congress, acting under its interstate commerce authority, might take over the supervision of this whole field or any part of it seems reasonably clear.³⁴ The possibility that the Congress has already done so was indicated by a Federal Communications Commission order handed down in 1948 in what has come to be well known as the *Port Huron* case.³⁵ The specific issue in the proceeding was whether a broadcasting license should be renewed for a station which had cancelled a candidate's contract for time for a political speech on the ground that there was defamatory matter in his script, but the Commission stated an interpretation of section 315 which apparently covered the field.³⁶ The opinion asserted that it was not permissible under section 315 for stations to delete anything — not even defamatory statements — from broadcasts by candidates and that, by reason of this, section 315 itself operates to preclude station liability for any defamation that might be present in such completely uncensorable broadcasts.

The question left by the *Port Huron* case was whether the new statements of law contained in the opinion really constituted a taking over of the field by federal authority. Probably they did not. They represented a logical next step after enactment of section 315, but the next step seemed one more appropriate for Congress than for the Commission to take. At least one court has in-

³¹ *Supra*, n. 16.

³² See *Josephson v. Knickerbocker Broadcasting Co.*, 179 Misc. 787, 38 N.Y.S. 2d 985 (1942). Cf. *Rose v. Brown*, 186 Misc. 553, 58 N.Y.S. 2d 654 (1945).

³³ *Sorensen v. Wood*, *supra*, n. 10. In this case liability was imposed for remarks which both the broadcaster and the court assumed, mistakenly, to be uncensorable. Cf. n. 28, *supra*.

³⁴ *Federal Radio Commission v. Nelson*, 289 U.S. 266 (1933); *Natl. Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

³⁵ *Port Huron Broadcasting Co. (W.H.L.S.)*, 12 F.C.C. 1069, 4 *PIKE & FISHER RADIO REG.* 1, 17 *LAW WK.* 2001 (1948); *Notes*, 16 *GEO. WASH. L. REV.* 573 (1948), 58 *YALE L. J.* 787 (1949).

³⁶ The license was renewed, therefore there was no appeal from the decision.

licated that it regarded the Commission's statements as *dicta* merely, not binding on the states or the lower federal courts.³⁷ A more significant fact, however, is that in 1952 definite efforts were made to induce Congress to enact new legislation amending and broadening section 315 in somewhat the same fashion that the *Port Huron* case interpreted it, also to extend station duties and immunities to speeches by supporters as well as by candidates themselves. For various reasons this proposed legislation failed.³⁸ Though the proposals received considerable attention,³⁹ the only amendment actually adopted was the short paragraph designed to limit the charges that stations might make for political broadcasts.⁴⁰ There is little evidence that the failure to enact the proposed bills was due to any feeling that the Commission had already established the federal rule adequately; rather, it was due to a failure to reach agreement on what the federal rule should be. The one point on which there appears to be general agreement is that a clear and specific enactment is needed.⁴¹ The answers which the common law has given to the problems have not been satisfactory.

One outstandingly unsatisfactory answer, superficial in itself but typical of the whole difficulty, is the assumed necessity of classifying defamation by radio and television as either libel or slander. This assumed necessity is based on the further assumption that the tort can be dealt with by the common law only if it is subsumed under one of these standard heads so that the whole body of case law already accumulated under that head, and no other

³⁷ *Hutcheson, J., in Houston Post Co. v. United States*, 79 F. Supp. 199, 204 (S.D. Tex. 1948). It should be noted, however, that the Commission has stayed with its position, and announced it anew, though perhaps more guardedly, in a later case. In re Application of WDSU Broadcasting Corp., 7 *PIKE & FISCHER RADIO REG.* 769 (1952).

³⁸ H.R. 7062, 82nd Cong., 2d Sess. (1952); H.R. 7782, 82nd Cong., 2d Sess. (1952). The legislative history is set out briefly in Snyder, *Liability of Station Owners for Defamatory Statements Made by Political Candidates*, 39 *VA. L. REV.* 303 (1953).

³⁹ For example, see Associated Press dispatches dated Washington, D. C., June 18, 1952, reporting bill sent to Senate-House conference committee for amendment of § 315.

⁴⁰ This is the paragraph now numbered (b) in section 315. See, *supra*, n. 27.

⁴¹ Shipley, *Radio, Political Speeches, and the Law of Libel*, 11 *FED. B.J.* 158 (1951); Berry and Goodrich, *Political Defamation: Radio's Dilemma*, 1 *FLA. L. REV.* 343 (1948); Peterson, *Political Broadcasts*, 9 *FED. COMM. BAR JOUR.* 20 (1948); De Grazia, *Equal Political Defamation for All: Section 315 of the Federal Communications Act*, 20 *GEO. WASH. L. REV.* 706 (1952); Snyder, *Liability of Station Owners for Defamatory Statements Made by Political Candidates*, *supra*, n. 38; Notes, 4 *BAYLOR L. REV.* 516 (1952); 46 *ILL. L. REV.* 626 (1951); 24 *So. CALIF. L. REV.* 216 (1951); 24 *TEMPLE L. Q.* 236 (1951); 61 *YALE L. J.* 87 (1952).

law, will be applied to it, whether it is sensibly relevant or not.⁴² That may be the way that courts ordinarily — too ordinarily — develop the common law today, but it is not the way the common law developed in the first place, nor the way that it *grows* now.

The Pennsylvania court, less hampered than most,⁴³ concluded that broadcast defamation was neither libel nor slander but a new tort, similar to but different from both the old torts of defamation, with freedom left to the court to determine anew (within the framework of existent law) what substantive rules should govern it. One need not at this stage agree that the substantive rule then selected was the ideal one; it is enough to observe that the court at least seemed to have a better opportunity to select rules ideally suited to the situation than would a court already bound to an *a priori* concept of the tort's name and character. Actually, this advantage may have been more seeming than real. Perhaps courts which concluded that the tort was slander, or was libel, may have been motivated more by the desirability of the substantive rules which the accepted characterization led to than by the mechanical facts which gave surface support to the conclusion. That this was what happened in the Nebraska court⁴⁴ is evident on the face of it. And the New Jersey court⁴⁵ was able to agree with the result reached in Pennsylvania, disagreeing with Nebraska, without deciding whether the tort was slander or libel — in effect assuming that it was libel,⁴⁶ as Nebraska had held. Naming the tort has something to do with the rule to be applied to it, but does not necessarily resolve all the questions that have to be answered. It would be realistic and would make good sense to recognize that television and radio are far outside what was envisioned by the framers of the common law of slander and libel, that their concepts of defamation have little or no relation to the problems presented by the new medium of communication. The issue of nomenclature, however, merely introduces the problem, or at most symbolizes it. The substantive questions remain.

In arguing these questions, there has been some tendency on both sides to emphasize physical distinctions and resemblances, particularly with reference to the newspaper cases in which the absolute liability rule has been developed.⁴⁷ Both differences and similarities undoubtedly exist. But rejection or acceptance for

⁴² For the current state of the common law cases, see, *supra*, n. 20.

⁴³ *Summit Hotel Co. v. Natl. Broadcasting Co.*, *supra*, notes 16, 20.

⁴⁴ *Sorenson v. Wood*, *supra*, n. 10.

⁴⁵ *Kelly v. Hoffman*, *supra*, n. 21.

⁴⁶ The result was reached by applying the disseminator rule, which is as much a part of the law of libel as is the absolute liability rule.

⁴⁷ See, for example, the *Vold*, *Seitz*, and *Sprague* articles cited, *supra*, n. 22.

radio and television of the analogy to newspaper absolute liability depends on something more significant than fact comparisons. All of the writers in the field have either at once or belatedly recognized this. The problem is one of social and legal policy. It is broadly the same problem of policy that has to be decided whenever any proposal is made for extension of tort liability beyond legal responsibility for "fault," whatever that is, into the realm of so called strict liability, entrepreneur liability, or liability without fault. So much has been written in recent years about the persistently expanding scope of absolute liability⁴⁸ that no recapitulation is necessary save as its reasoning is applied to the broadcasting cases:

There are many activities which create situations fraught with some danger to others, but because of the general social utility of the activities the risk is not regarded as unreasonable. When harm results the loss must necessarily fall upon one or the other of the parties, and in balancing the individual and social interests involved the courts have been influenced by the capacity of the respective parties to bear the loss. Where dangers from socially desirable conduct are especially great and where the person carrying on the activity is greatly benefited therefrom in comparison to the loss to the injured person and is in a peculiarly advantageous position to administer the risk by distributing the loss or passing it on to the public, the risk of such losses is imposed upon the person causing them irrespective of fault. The defendants in tort cases are, to a large extent, public utilities, industrial corporations, commercial enterprises, and, in defamation cases, newspapers and radio stations who, by means of rates, prices, or insurance, are best able to distribute to the public at large the risks and losses which are inevitable in a complex civilization. The problem is purely one of allocating a probable or inevitable loss in such a manner as to entail the least hardship upon any individual and thus to preserve the social and economic resources of the community. . . . Reputation may be harmed quite as much by a libel innocently or inadvertently published as by any other kind. Such a risk is properly allocated to those whose enterprises, operated for their own immediate profit, create it. Losses of this nature can be regarded as one of the expenses of the undertaking which caused them.⁴⁹

Needless to say, defendants cannot be expected to accept the application of this theory to themselves, either individually or in eco-

⁴⁸ See EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951); James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U.L.Q. REV. 537 (1952); Leflar, *Negligence in Name Only*, 27 N.Y.U.L.Q. REV. 564 (1952); and other writings therein cited.

⁴⁹ Donnelly, *Defamation by Radio: A Reconsideration*, 34 IOWA L. REV. 12, 23-24 (1948).

nostic groups, without a fight. The broadcasters as a defendant group were during the early 1930's about to be classified pretty much automatically into the category of enterprise liability defendants, along with newspapers, in defamation cases. Then they began to fight, vigorously and effectively.⁵⁰ A practical reversal of the original trend, both judicial and legislative, has been the result.

The principal argument which they have used is simply that liability without fault is unfair to defendants.

Beyond that, they have pointed out that in the ordinary situation a newspaper owner's employees have a somewhat better opportunity to catch and exclude libels than do the employees of a radio or television station, at least where unexpected interpolations by outsiders are the source of the libel. This is "because of the superior control of the newspaper publisher whose copy is prepared in advance, reviewed by various staff members, set into type, printed, proof-read and then 'run off' by an employee of the publisher, the publisher having the opportunity to prevent the publication of the defamation at all times up to the very minute the paper is delivered to the news vendor."⁵¹ Obviously, this is an opportunity which the broadcaster of interpolated comments never has, or has for so brief an instant that no true opportunity ever exists. The calling of attention to the newspaper's chance to prevent the libel implies that somehow there may have been fault in not preventing it, so that newspaper liability may be deemed not strict liability, but only liability for fault after all. But this is contrary to the specific grounds of decision in the newspaper cases. They purport to impose liability regardless of fault, they do not ask whether there was or was not negligence or other fault in any specific case. They simply cannot be explained away as cases involving some unidentified negligence in the defendant publishers.

This does not mean that they may not be distinguished from broadcasting cases in terms of the propriety of applying absolute liability to them. Perhaps they can be. Perhaps absolute liability ought never to be imposed unless the defendant is so situated that he has a reasonable opportunity to avoid liability by careful self-defensive conduct, a chance to duck before he is hit by an uncontrollable new cause of action. True, most of the reasoning formal-

⁵⁰ Professor Vold's criticisms of the broadcasting industry's efforts to avoid absolute liability are interesting though perhaps somewhat naive in the light of accepted lobbying and public relations practices in modern American "big industry." See Vold, *Defamatory Interpolations in Radio Broadcasts*, 88 U. OF PA. L. REV., 249, 256, 273, 283, 293 (1940). Cf. Remmers, *Recent Legislative Trends in Defamation by Radio*, 64 HARV. L. REV. 727, 740 (1951); Note, 61 YALE L. J. 87 (1952).

⁵¹ Sprague, *More Freedom of the Air*, 11 AIR L. REV. 17, 18 (1940).

ly presented in support of doctrines of absolute liability does not state this as a limitation upon their applicability; the reasons are usually stated in terms of socially beneficent loss distribution, or capacity to bear loss, coupled with recognition of the artificiality of the concept of "fault" as applied to the treasuries from which most tort judgments are paid.⁵² The possibility of protective or preventive action may nevertheless well be relevant. Increasingly there is realization that the function of a good law of torts should be to prevent harms as well as to compensate for them after they have occurred.⁵³ Insofar as a rule of absolute liability creates pressure on one in control of a dangerous situation to exercise a high degree of care to prevent it from producing harm, or induces him to forego the activity altogether, rather than run the risk of resultant liability, the rule has significant preventive as well as compensatory effect. That fact affords a real additional reason for imposing absolute liability. If, however, no amount of care could guard against the threatened harm, the preventive significance is lessened; it is limited to the possibility of foregoing the dangerous activity altogether. When the dangerous activity is the dissemination of ideas and information, and the effect in practice of foregoing it would be that certain speakers might be cut off the air altogether, thus barring legitimate speech in order to take no chances on the possibility of something illegitimate being said, the virtue of this pressure toward prevention fades rapidly and almost disappears.

It is true of course that the whole law of defamation is an invasion of the public interest in free speech and free press. Here are two bodies of law that are in perpetual opposition to each other. But the law of defamation is for the most part a law that provides compensation or other relief after the event. It seldom seeks prevention by enjoining publications.⁵⁴ Its preventive operation looks rather toward, and only toward, the discouragement of intentional publications of defamatory matter. Insofar as a rule of absolute liability might serve to discourage innocent and non-defamatory publications it draws no support from society's interest in preventive justice. Support for it must come solely from the reasons which have to do with fair loss distribution in our complex society, the reasons which sometimes justify placing the burden of tort risk upon the enterpriser who benefits from the harm producing activity

⁵² *Supra*, n. 48.

⁵³ McNiece and Thornton, *Automobile Accident Prevention and Compensation*, 27 N.Y.U.L.Q. REV. 585 (1952); James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L. J. 549, 569 (1948).

⁵⁴ See Leflar, *Legal Remedies for Defamation*, 6 AER. L. REV. 423, 431 (1952). Cf. Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640 (1916).

rather than leaving it upon the innocent bystander who happens to get hurt by it. As between such an innocent plaintiff and such an innocent defendant, it is as fair that one bear the loss as that the other bear it. The decision between them can legitimately be left to a balance of competing social policies. In this instance it is submitted that these are represented by society's interest in a comprehensive system of tort compensation, which favors liability regardless of fault, and society's interest in completely free and unfettered broadcasting on radio and television, which might to some degree be interfered with by the absolute liability rule.⁵⁵ In this instance, resolution of the conflict of interests is hampered by the fact that we are not by any means all agreed that either of the competing interests, thus baldly set forth, really is sound social policy at all or should be sought after even if no competing interest opposed it.

If principal emphasis is to be placed upon fair loss distribution regardless of fault, then the availability of liability insurance coverage is obviously relevant. Such insurance today furnishes the financial background of most of the major American areas of tort and personal injury liability, including not only workmen's compensation and employers' liability but automobile accidents as well.⁵⁶ Insofar as the possibility of "spreading the loss" over the industry, or over the group of those who derive profit from the risk-creating activity, constitutes justification for a liability-imposing rule of law, some system of insurance is essential if the justification is to be realistic. Defendants will sometimes be large organizations capable of carrying what amounts to self-insurance, but when the defendant is not a large or wealthy organization he may if uninsured be financially ruined by a single tort judgment. That in no sense represents an absorption of tort loss by the industry nor a placement of the burden upon those best able to bear it.

Actually, it appears that insurance against liability for defamation is generally available to newspapers and broadcasters in America today. It is written largely by a single insurance company,⁵⁷ and policies vary according to the status and needs of the

⁵⁵ Cf. Donnelly, *Defamation by Radio: A Reconsideration*, 34 IOWA L. REV. 12, 28 (1948).

⁵⁶ There are those who suggest that the law of torts is in many respects becoming a branch of the law of insurance. Cf. James and Thornton, *Impact of Insurance on the Law of Torts*, 15 LAW AND CONTEMP. PROB. 431 (1950); James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L. J. 549 (1948); Note, 60 YALE L. J. 647 (1951).

⁵⁷ Employers Reinsurance Corporation, Insurance Exchange Bldg., Kansas City, Mo. See pamphlet, *IS LIBEL A CLOUD OVER YOUR HEAD?* issued by this company, which has been writing this type of liability insurance since 1930. Their policies include not only liability for libel and slander, but also for

insured, and particularly according to the size of his publishing or broadcasting enterprise. Furthermore, the policies are written as "excess" or "catastrophe" insurance, under which the insured bears the risk of the first \$1,000, \$2,500, \$5,000 or even \$10,000 of loss, with the insurer carrying the balance of the risk up to a stated maximum, usually \$300,000 a year.⁵⁸ The rate is therefore fairly low, depending however on a variety of other factors.⁵⁹

Despite the availability of defamation liability insurance, however, and its effect by way of spreading defamation risks throughout the affected industry as a whole in the form of insurance premiums as a slight increase in customary operating costs, the current trend is strongly away from strict liability as the governing rule in the field of radio and television defamation. This trend can be explained largely in terms of the "public relations work" of the National Association of Radio and Television Broadcasters,⁶⁰ commonly styled the NARTB.

A few years ago NARTB drafted a "Model Act" relating to defamation by radio and television, and began its active sponsorship, principally through member stations all over the country, before the legislatures of the various states. The suggested statute⁶¹ reads as follows:

violation of rights of privacy, copyright, plagiarism and piracy of literary materials. Intentional as well as unintentional torts are covered.

⁵⁸ Letter dated April 7, 1954, from Reginald Geiser, Libel Dept., Employers Reinsurance Corporation, to the author.

⁵⁹ A question might be raised as to the validity of a contract insuring against liability for a tort ordinarily classified as an intentional rather than a negligent one. It is ordinarily said that a contract to indemnify a tortfeasor for torts knowingly committed is invalid. 6 WILLISTON, CONTRACTS (Rev. ed., 1938) § 1751; note, 173 A. L.R. 503 (1948). This is on the idea that such promised insurance or indemnity might encourage deliberate commission of the tort. It seems that this rule would have little relevancy, however, to a situation in which the insured will seldom be personally the wrongdoer. The insured's liability will usually be based on *respondet superior*, or on some other theory under which the actual wrongdoer was further removed from his personal control. "Undoubtedly a contract indemnifying another against consequences arising from wilful violations of a statute, or from the commission of crime generally, committed by the assured himself, is void for the reason given, but one may lawfully insure another against the consequences of such acts committed by his servants and employees, if such acts are not directed by or participated in by the assured." *Taxicab Motor Co. v. Pacific Coast Casualty Co.*, 73 Wash. 631, 639, 132 Pac. 393, 396 (1913).

⁶⁰ With headquarters at 1771 N St., N.W., Washington 6, D. C. Mr. Vincent T. Wasilewski, Chief Attorney for NARTB, is a well known figure in the radio and television industry.

⁶¹ The suggestion has been seriously made that this Model Act may be unconstitutional, in that it takes away a type of right previously conferred by the common law, and also benefits one class of defendants only (radio and television broadcasters) whereas other classes of defendants to whom

Section 1. The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, by one other than such owner, licensee or operator, or agent or employee thereof, unless it shall be alleged and proved by the complaining party, that such owner, licensee, operator or such agent or employee, has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast. Provided, however, the exercise of due care shall be construed to include a bona fide compliance with any federal law or the regulation of any federal regulatory agency.

Section 2. In no event, however, shall any owner, licensee or operator, or the agents or employees of any such owner, licensee or operator of such a station or network of stations, be held liable for any damages for any defamatory statement uttered over the facilities of such station or network by or on behalf of any candidate for public office.

Section 3. In any action for damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, the complaining party shall be allowed only such actual damages as he has alleged and proved.

This proposed Act has been adopted almost word for word in several states,⁶² and substantial parts of it⁶³ or similar enactments

the rule should in theory apply equally (newspaper and magazine publishers, for example) are denied the equal protection of the laws by being left subject to the burdens of the older rule. Comment, 29 NEB. L. REV. 133 (1949); Remmers, *Recent Legislative Trends in Defamation by Radio*, 64 HARV. L. REV. 727, 745 (1951). But see Leflar, *Legal Remedies for Defamation*, 6 ARK. L. REV. 423, 439 (1952). The abolition of old tort remedies by statutes which are not retroactive is quite common today, and readily sustained. Enactments abolishing the causes of action for criminal conversation, alienation of affections, and the like, are illustrative. And a classification based on the difference between two industries as distinct as broadcasting and newspaper or magazine publishing seems altogether reasonable. See *Werner v. Southern California Newspapers*, 35 Calif. 2d 121, 216 P. 2d 825, 13 A.L.R. 2d 252 (1950), appeal dismissed on appellant's motion, 340 U.S. 910 (1951). It is interesting, however, that in the *Werner* case the appeal to the United States Supreme Court, attacking the constitutionality of a California retraction statute which raised somewhat similar problems, was dropped only after the appellant received a substantial payment, raised as a "settlement pool" by a group of publishers who reportedly preferred not to have an appeal on the constitutional issue. News item in EDITOR AND PUBLISHER, Jan. 6, 1951.

⁶² ARIZ. SESS. LAWS (1953) ch. 20 (Model Act in full); GA. CODE ANN. (1951 Supp.) §§ 105-712-105-714 (Model Act, except proviso sentence at end of § 1 omitted); LA. REV. STATS. (West, 1950) TITLE 45, §§ 1351-1354 (omits proviso sentence from § 1, adds "or in opposition to" near end of §

designed to achieve nearly the same purposes⁶⁴ have been adopted in still more states.

2, limits § 3 somewhat, adds § 4 making clear that liability of actual defamer remains unchanged); NEB. REV. STATS. (Reissue 1950) §§ 86-601—86-603 (omits proviso sentence from § 1, in § 2 narrows non-liability conferred by the act); WYO. COMP. STATS. (1953 Supp.) §§ 3-8203—3-8205 (omits proviso sentence from § 1, deletes "or on behalf of" from last line of § 2.)

⁶³ CALIF. CIVIL CODE (Deering, 1949) § 48.5 (§ 1 except proviso and placement of burden of proof on defendant, also no station liability for network defamations, no liability for non-censorable political broadcasts); COLO. STATS. ANN. (Supp. 1949) ch. 138B, § 1 (§ 1 except proviso, and placement of burden of proof on defendant, also no liability for non-censorable political broadcasts); FLA. STATS. (1951) § 770.03 (no liability unless defamation in script required to be submitted 24 hours before broadcast), § 770.04 (§ 1 of Model Act); IOWA CODE ANN. (1950) § 659.5 (like § 1 except proviso omitted and burden of proof on defendant); KANS. LAWS (1953) ch. 277, p. 503 (§ 1 but proviso omitted, also no liability for non-censorable political broadcasts); MICH. STATS. ANN. (1953 Supp.) §§ 27-1405, 27-1406 (§ 1 but proviso omitted, also no liability for non-censorable political broadcasts); MINN. LAWS, (1953) ch. 680, p. 861 (§ 1 but proviso omitted, burden of proof on defendant); MISS. ACTS 1954, No.—, signed Apr. 21, 1954 (no liability for defamations by others regardless of negligence, also like § 2 of Model Act unless broadcast made by agent or employee of station); NEV. STATS. (1951) ch. 230 (like California, *supra*); N.C. GEN. STATS. (1950) § 99-5 (similar to § 1, but no placement of burden of proof); OREGON REV. STATS. (1953) § 30-760 (§ 1 except proviso, no liability for uncensorable political broadcasts); S.D. SESS. LAWS (1949) ch. 206, p. 245 (§ 1 without proviso); TEXAS CIV. STATS. (Vernon, 1953 Supp.) § 5433a (§ 1 without proviso); VA. CODE (1950) § 8-632.1 (substantially similar to §§ 1 and 2 of Model Act); W. VA. ACTS (1953) ch. 2, p. 2 (§ 1 without proviso, no liability for defamations "by any legally qualified candidate for public office").

⁶⁴ MAINE, PUBLIC LAWS (1949) ch. 134, § 31-A (no liability if defendant proves "reasonable care and diligence," nor for non-censorable statements by or on behalf of candidates or concerning matters referred to referendum); MONT. REV. CODE (1947) §§ 64-205—64-208 (no liability for defamation by others in "discussion of controversial or any other subjects" unless "actual malice" in station owner or operator, may require submission of scripts in advance, no limitation on liability of one actually guilty of defamation, liability for network broadcasts only on originator, other provisions concerning retraction and privilege); N.D. LAWS (1953) ch. 122, p. 161 (no liability for defamations published by others); OHIO REV. CODE (Page 1953) § 2739.03 (no liability for uncensorable political broadcasts except when owner, licensee or operator is a candidate or speaking on behalf of a candidate, no liability generally if defendant proves reasonable care, also provisions for broadcasting denials, etc.); PA. STATS. ANN. (Purdon, 1953) Tit. 12, § 1583 (liability only if "publication has been maliciously or negligently made"); UTAH CODE ANN. (1953 Supp.) §§ 45-2-5—45-2-10 (same as Montana, *supra*, plus 1953 amendments expressly including television, also network programs barring liability for any defamation by a candidate for public office, no liability in any event unless complainant proves failure to exercise due care to prevent publication, and compliance with federal law constitutes due care); WASH. REV. CODE (1952) §§ 19.64.010, 98.64.020 (no liability for interpolations not in script if submission required in advance and speaker cut

Two features of the NARTB Model Act deserve special notice. One is that Section 1 puts the burden of alleging and proving the defendant's failure to exercise due care upon the complainant. Several of the states adopting this section have chosen to put this burden instead on the defendant owner, operator or licensee,⁶⁵ presumably for the sensible reason that the evidence on this issue will ordinarily be almost wholly within the defendant's control. The other is that by Section 2 there is no liability whatever, under any circumstances, for defamatory statements uttered "by or on behalf of any candidate for public office." At least three states,⁶⁶ noting that this would eliminate liability even for deliberate defamations by owners, licensees or operators of broadcasting stations covered by the section, have expressly provided for liability when such personal responsibility exists. Several other states⁶⁷ have changed the section entirely to limit non-liability practically to situations in which the political broadcast was not censorable because of federal law.⁶⁸

Another substantial number of states have confined their new enactments to the political broadcast problem alone, generally providing merely for non-liability for non-censorable political broadcasts. The Arkansas statute⁶⁹ enacted in 1953 is typical. It reads:

Neither the owner, licensee or operator of a visual or sound radio broadcasting station or network of stations nor his agents or employees shall be liable for any damages for any defamatory statement published or uttered in, or as a part of, a visual or sound broadcast by a candidate for political office in those instances in which, under the acts of Congress or the rules and regulations of the Federal Communications Commission, the broadcasting station or network is prohibited from censoring the script of the broadcast.

No two of these "political" statutes⁷⁰ are exactly alike, but they

off air promptly when deviation is discovered). And see ILL. REV. STATS. (1953), ch. 38, §§ 402—404.4 (relates to criminal liability).

⁶⁵ E.g., statutes of California, Colorado, Iowa, Maine, Minnesota, Nevada, North Carolina, Ohio, *supra*, notes 63, 64.

⁶⁶ Mississippi, *supra*, n. 63; Nebraska, *supra*, n. 62; Ohio, *supra*, n. 64.

⁶⁷ E.g., California, Colorado, Kansas, Maine, Michigan, Nevada, and Oregon, *supra*, notes 63, 64.

⁶⁸ § 315, discussed, *supra*, n. 27.

⁶⁹ ARK. ACTS (1953) No. 125; ARK. STATS. (1953 Supp.) § 3-1606, commented on in 7 ARK. L. REV. 375 (1953).

⁷⁰ IDAHO SESS. LAWS (1953) ch. 29, p. 49 (no liability, unless owner, licensee or operator, or his agent or employee is the candidate or speaks on behalf of a candidate); MD. LAWS (1952), Act 75, § 19A (no liability for uncensorable statements by candidate concerning opponent; non-opponents may recover actual damages only, unless malice in defendant); MO. ANN. STATS. (VERNON, 1953) § 537.105 (similar to Arkansas act, *supra*, n. 68); PA. STATS.

are similar. Incidentally, it appears that any state which has enacted only Section 1 of the NARTB Model Act, or its equivalent⁷¹ has achieved substantially the same protection for stations in reference to non-censorable political broadcasts, since a lack of due care will seldom be discoverable in connection with them.

Of the 32 states whose statutes, changing the legal basis for civil liability in radio and television defamation cases, which have just been analyzed,⁷² seventeen⁷³ (more than half) were enacted in the last four years. This in itself constitutes something of a forecast as to the legislative trend in the immediate future.⁷⁴

In the light of this legislative growth, theoretical discussion of the direction which the common law ought to take seems rather profitless. The forces which, in the days of radio's large-scale beginnings, induced enactment of new statutes to regulate an infant industry that did not fit into any established common law patterns now have extended themselves into the defamation field. The problems have become legislative rather than judicial ones partly because the industry was dissatisfied with the answers given by some of the courts and partly because it belatedly recognized that courts could not lay down in one piece the clear-cut rules that the industry needed. The industry cannot be blamed if, in its Model Act, it phrases the proposed rules so as to give itself a maximum of freedom from liability. After all, the responsibility for nice discernment and careful protection of the public interests rests ultimately upon the legislatures. That they in general have been

(Purdon, 1953 Supp.) Title 12, §§ 1585, 1586 (no liability for broadcasts not censorable under federal law); S. C. CODE OF LAWS (1953 Supp.) § 23.7 (no liability if station announces at end of broadcast that it was noncensorable).

⁷¹ This would include Florida, Iowa, Minnesota, South Dakota and Texas, *supra*, n. 63.

⁷² A much more thorough analysis of all the statutes up to three years ago appears in the scholarly article by Remmers, *Recent Legislative Trends in Defamation by Radio*, 64 HARV. L. REV. 727 (1951). The present article does not undertake to repeat this thorough analysis.

⁷³ Arizona (1953), Arkansas (1953), Idaho (1953), Kansas (1953, revising 1949 enactment), Maryland (1952), Minnesota (1953), Mississippi (1954), Missouri (1952), Nevada (1951), North Dakota (1953), Ohio (1953), Oregon (1953, as to uncensorable political broadcasts), Pennsylvania (1953, as to noncensorable broadcasts), South Carolina (1952), Texas (1953), Utah (substantial amendments in 1953), West Virginia (1953).

⁷⁴ It is also worth noting that in 1953 four states enacted the newly promulgated UNIFORM SINGLE PUBLICATION ACT—ARIZ. SESS. LAWS (1953) ch. 96; IDAHO SESS. LAWS (1953) ch. 109; N.D. LAWS (1953) ch. 123, p. 162; PA. STATS. (Purdon, 1953 Supp.) Title 12, §§ 2090.1—2090.5. One effect of this act is to limit the liability of large scale publishers for defamations. Cf. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959 (1953); Leflar, *The Single Publication Rule*, 25 ROCKY MTN. L. REV. 263 (1953).

aware of this responsibility is indicated by the fact that the Model Act has been adopted wholly without change in very few states. As already noted,⁷⁵ several of the states put the burden of proof on the negligence issue on the defendant instead of on the complaining plaintiff, and others expressly limit the Act's broad non-liability for utterances by candidates. Still more have enacted only section one of the Act, or have in some other way exhibited their independence by rewording it or deleting parts of it before enacting it. Perhaps some of these modifications were the work of local sponsors. At any rate the results indicate some legislative skepticism and presumably a corresponding concern that the law not go too far in the direction of denying remedy to defamed plaintiffs. It may fairly be expected that more states will in the next few years follow the now well-established legislative trend.

⁷⁵ *Supra*, notes 65, 66.