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LIBEL AND SLANDER-RADIO DEFAMATION-LIABILITY OF BROADCASTING COMPANY FOR DEFAMATORY STATEMENTS MADE OVER ITS FACILITIES

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LIBEL AND SLANDER—RADIO DEFAMATION—LIABILITY OF BROADCASTING COMPANY FOR DEFAMATORY STATEMENTS MADE OVER ITS FACILITIES—During a radio program, a lessee of broadcasting facilities read previously prepared statements regarding a public official which were defamatory per se. In an action for defamation against the broadcasting company, defendant attacked the complaint as insufficient in failing to allege negligence. *Held*, the allegation of negligence is essential, but the complaint was sufficient. *Kelly v. Hoffman*, (N.J. 1948) 61 A. (2d) 143.

The few cases to consider the liability of a broadcasting company for defamatory statements made over its facilities seem to agree that the problem is one involving the law of libel.[1] There is, however, considerable disagreement as to whether strict liability or negligence is the proper standard to be applied. The first three courts to consider the question imposed strict liability on the broadcasting company by analogy to the rule usually applied to newspaper publishers.[2] Notwithstanding the different modes of communication involved, these two media are in direct competition and have an equivalent capacity for harm because of their capacity for broad dissemination. More recently the Pennsylvania court absolved a broadcasting company of liability upon a showing of due care,[3] but, since the decision turned upon a state doctrine which denies strict liability in all cases not involving injury to real property, it cannot be taken as a repudiation of the newspaper analogy. On the other hand, in the principal case, the first judicial rejection of the newspaper analogy, the court held that a broadcasting company is not a publisher but is merely a disseminator of libelous matter and consequently is liable only upon a showing of negligence.[4] Although the latter two decisions, the only cases in point since 1934, have applied the negligence test, it does not appear that the law is settled[5] or even that there is a definite trend away from strict liability. Much can be said for either view. In support of strict liability are

[1] See Nash, "The Application of the Law of Libel and Slander to Radio Broadcasting," 17 ORE. L. REV. 307 (1938); Locke v. Gibbons, 164 Misc. 877, 299 N.Y.S. 188 (1936); cf. State v. Reade, 136 N.J.L. 432 at 433, 56 A. (2d) 566 (1948); PROSSER, TORTS 794 et seq. (1941). See also 24 MARQ. L. REV. 117 (1940); 25 MARQ. L. REV. 57 (1941); 25 MARQ. L. REV. 192 (1941). This unusual characterization of audible defamation as libelous rather than slanderous is an apparent recognition of the novelty and importance of radio defamation. Cf. Brown v. Paramount-Publix Corp., 240 App. Div. 520, 270 N.Y.S. 544 (1934).

[2] Sorenson v. Wood, 123 Nebr. 348, 243 N.W. 82 (1932); Miles v. Wasmer, 172 Wash. 466, 20 P. (2d) 847 (1933); Coffey v. Midland, (D.C. Mo. 1934) 8 F. Supp. 889. There was sufficient evidence of negligence in the first two of these cases to hold the broadcasting company without the imposition of strict liability, but the third must be taken to stand squarely for liability without fault on the basis of the newspaper analogy.

[3] Summit v. N.B.C., 336 Pa. 182, 8 A. (2d) 302 (1939).

[4] The decision was influenced considerably by the arguments of Bohlen, "Fifty Years of Torts," 50 HARV. L. REV. 731 (1937). See also PROSSER, TORTS 819, 820 (1941). But cf. Summit v. N.B.C., supra, note 3, where the disseminator doctrine was expressly rejected.

[5] The American Law Institute takes no position on strict liability but would hold the broadcasting company liable at least for negligence. See TORTS RESTATEMENT, § 577, caveat §581 (1938). Cf. TORTS RESTATEMENT, Tentative Draft No. 12, §1024, p. 127 (1935).

the factors of great damage due to large audiences, the inconsequential effect of attempted retractions, the permanence of the defamation resulting from increasing use of records and transcriptions, and the substantial public interest involved because of the powerful influence of radio on popular opinion. Against these must be weighed the encouragement of uncensored speech, the difficulty of preventing defamation on spontaneous broadcasts, the lack of direct responsibility in local stations relaying broadcasts which originate in other studios,[6] the impracticability of on-the-air deletion by legally-trained monitors, and the fact that lessors of broadcasting facilities normally enjoy considerably less control over their lessees than do newspaper publishers over the material included in their publications. Since the federal government's stringent control over radio broadcasting particularly precludes censorship of political broadcasts,[7] it has been suggested that the negligence standard should be applied at least with respect to political, religious and spontaneous news broadcasts.[8] On the other hand, this close federal control has been interpreted as an exemplification of the intense public interest involved and as a decisive factor in favor of strict liability.[9] Statutes pertaining to the entire field of radio defamation have been enacted in several states[10] in an apparent attempt to resolve the conflicting common law analogies. Although none of these has been interpreted regarding its effect on the liability of broadcasting companies, they seem to tend toward the negligence test, even where it is provided that radio defamation is to be treated as libel.[11] Since continued misconduct will result in suspension of the federal license required for all broadcasting,[12] it would appear that the general public is adequately protected, at least against gross abuse, regardless of the tort liability imposed by state law. Where the speaker is not an employee[13] of the broadcasting company, it is doubtful that the public interest would be materially advanced by the imposition of strict liability upon a class which is often powerless to prevent the injury.[14] Neither does it appear that strict liability would any more encourage careful editing of prepared broadcasts than would the

[6] For the effect of strict liability in such a case, see Coffey v. Midland, supra, note 2.

[7] Federal Communications Act of 1934 (The "Radio Act"), 48 Stat. L. 1088, 47 U.S.C. (1946), §315 et seq. See also Sorenson v. Wood, supra, note 2.

[8] See, for example, 64 A.B.A. Rep. 188 (1939).

[9] See the dissent, principal case, at 147.

[10] California Penal Code (1941), §258; Illinois Rev. Stat. (1947), c. 38, §404.2; North Dakota Laws 1929, c. 117; Oregon Laws 1931, c. 366; Iowa Laws 1937, c. 238; Indiana Law 1937, c. 37; Montana, 1939 Supp. to 1935 Rev. Codes, §5694.1; Florida, General Law 1941, c. 20869; Washington Laws, 1935, c. 117.

[11] To this effect, see the statutes of Florida, Iowa and Montana, supra, note 10.

[12] See the Federal "Radio Act," supra, note 7.

[13] If the speaker is an employee of the broadcasting company rather than a lessee there should be little difficulty in holding the company liable directly on an agency theory. This factor might suffice to distinguish Miles v. Wasmer, supra, note 2.

[14] See Irwin v. Ashurst, 158 Ore. 61, 74 P. (2d) 1127 (1938). But cf. the reasoning in Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191, 51 S.Ct. 410 (1931).

requirement of a high degree of care. It would seem, then, that the position taken in the principal case is a reasonable and desirable one, but the analytical difficulties in the field of radio defamation suggest that the preferable solution lies in legislative action unencumbered by common law distinctions.[15]

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[15] Cf. provisions of French statute, PROSSER, TORTS 809 (1941). To the effect that radio defamation should be treated by the courts as a "new tort," see 24 MINN. L. REV. 118 (1939); 17 ORE. L. REV. 314 (1938). For comment on common law distinctions see 33 VA. L. REV. 612 (1947).