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EXTEMPORANEOUS DEFAMATION BY RADIO: A REJOINDER

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MY good friend, Professor Seitz,[†] in the April, 1940, issue of THE MARQUETTE LAW REVIEW, at pages 117-125, submits a suggested rationalization of the judicial materials to support immunity of radio stations from liability for defamatory extemporaneous interpolations in radio broadcasts. In the course of his discussion Professor Seitz repeatedly challenges certain views which he attributes to me in my earlier discussion of the same problem, wherein I supported the position of liability for the radio station. I will not linger over the preliminary point that the views attributed to me in several minor particulars seem much distorted by assumptions implicit in his discussion which are directly contrary to those on which my statements were based. It seems apparent that our differences arise out of fundamentally divergent basic assumptions upon which the course of reasoning is founded. The statement of his position is so ingenious, however, and is expressed in such novel and disarming phraseology, that it readily invites assent without scrutiny of the unexamined basic assumptions upon which the

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argument is built. It therefore seems desirable by way of rejoinder to scrutinize the correctness of those basic assumptions, in order that possible future decisions to be based thereon may not be vitiated by misconceptions of fact. As I have elsewhere attempted to set forth a comprehensive analysis of the problems involved in defamation by radio, together with citations to authorities bearing thereon,¹ these need not be repeated here.

1. Consent to Publish and Intent to Publish.

The first part of the article by Professor Seitz is concerned with "Non-consent as an element in determining liability." It is stated to be clear that "newspapers and others did intend to publish that which appears in print, and that as a result some third person suffered harm to his reputation. Fairness demands that the disseminator respond in damages for the harm caused. Justice should not be restricted just because certain extrinsic facts happen to be known to readers which are not discoverable by publishers even when they exercise the highest degree of care. Almost universal accord with such a philosophy is not surprising. Such agreement is induced by the realization that a defendant *consented* to the publication. But the element of consent is so obvious that the courts neglect to talk about it. For when a group of words appears in print it is unnecessary to point out that the publisher consents to their appearance. . . . As has already been pointed out, a newspaper is liable only because it consented to print an article—that is so even though it did not intend to defame. Consequently it would seem that the direct analogy which Professor Vold draws between the liability of a newspaper for defamation and what should be the liability of a broadcasting station for a harmful extemporaneous remark can be challenged. And that is so even if we grant the truth of the statement on which the analogy is based, namely that a newspaper in all instances cannot protect itself by the use of due care. . . . For it does not follow from such suggested premise, as Professor Vold would make it appear, that the broadcaster should be liable if an advertiser speaks a defamatory interpolation. True it is that the broadcaster is in no better position to have advance knowledge of the defamatory character of the statement than is the newspaper publisher. But he is in a better position as regards consent to publish. The newspaper publisher did consent; the broadcaster did not."

¹ *Defamation By Radio*, (1932) 2 J. RADIO L. 673; *The Basis for Liability For Defamation By Radio*, (1935) 19 MINN. L. REV. 611; *Defamatory Interpolations in Radio Broadcasts*, (1940) 88 U. OF PA. L. REV. 249. Attention may also be called to "Modern Tort Problems" a series of lectures by Professor Laurence H. Eldredge of the Law School of the University of Pennsylvania before the Institute of the Cleveland Bar Association, in April, 1940. In a reprint of those lectures by the Cleveland Bar Association his treatment of the problems of defamation by radio appears at pp. 36-47.

After the portion of the article here quoted Professor Seitz refers to the field where by statute owners of automobiles are made liable for the negligence of persons operating a car with the owner's consent. His application of this analogy to the radio interpolation problem appears in the following. "Having in mind the holdings under the automobile owner's liability statutes, the writer cannot recognize the validity in the argument that since permission to use was granted, and since the radio station when it grants such permission loses vital and sufficient control over the instrument to stop the defamatory remark, it has in effect consented to all that may possibly result. Such thinking seems to depend upon too liberal a connotation of the word 'consent'."

In reading the foregoing it promptly occurred to me that underlying this form of statement was the unexpounded and perhaps unexamined fact assumption that in admitting an advertiser to its microphone the radio station in effect turns its facilities over to the advertiser. If not, why emphasize consent to what another says? If not, why define the question in terms of making the broadcaster liable "if an advertiser speaks a defamatory interpolation"? Only thus, it would seem, can the question of consent, as distinguished from intent, be material to the discussion, since no questions can arise about an actor's consent to his own voluntary act. If not, why the elaborate emphasis upon the suggested analogy of the owner of an automobile consenting to its operation by another? In other words, this exposition seems to assume that the radio station in effect turns its facilities over to outside advertisers where such outside talent are admitted to its microphone. Apparently this is substantially the same assumption which underlies the fallacious form of statement, sometimes indulged, that the radio station leases its facilities to advertisers admitted to its microphone. On that assumption of fact it readily follows that the question of liability is regarded as a question of whether or not the radio station is to be held accountable for misuse of its facilities by another, the advertiser, in uttering defamatory words to which the radio station has not consented and which the radio station fails to stop.

Such fact assumption, however, on which the suggested analysis of the applicable basis for liability apparently is based, is itself entirely unfounded. True, it has been frequently indulged by counsel for radio stations in their arguments in defamation cases, though in radio station tax cases they have equally freely insisted upon the contrary view. The fact assumption that the station turns its facilities over to the speaker at the microphone being without support in the actual facts of broadcasting, and its reverse being true, the superstructure of argument based thereon is without support in the facts so far as cases of defamation by radio are concerned. It is not a question, as thus apparently assumed, of holding the radio station liable for defamatory utterances by an-

other, the advertiser admitted to its microphone, to whose defamation of the plaintiff the broadcasting station has not consented and which it fails to stop.

The actual facts are that the radio station throughout operates its own apparatus in broadcasting to listeners the words spoken by the outside advertiser into its microphone.² Whether in such cases the speaker's words conform to a previously approved manuscript or whether they depart therefrom in extemporaneous interpolation, in either event the speaker's words are equally transmitted to listeners by the broadcasting operations of the radio station. The radio station is therefore not in such cases being held accountable for defamation of the plaintiff by another who without its consent has misused its facilities. It is being held accountable for *its own transmission* of that other's defamatory words to the listeners at receiving sets. Not the advertiser's misconduct, but its own active participation in such misconduct, is the basis for the radio station's liability.

The question at issue therefore is not whether the radio station consented in the instance to the words uttered by the speaker, whether conforming to the manuscript or departing therefrom. The question is rather whether by its own broadcasting operations the radio station itself *actually did in the instance transmit* to listeners at receiving sets the utterances which the advertiser admittedly did speak into its microphone.

The physical facts of broadcasting seem too clear for dispute that the radio station does thus transmit such utterances. That this is the actual physical fact I do not understand anyone familiar with current broadcasting practice to deny. That such is the actual fact is insisted upon by the radio stations themselves in tax cases. That such is the actual fact has been deliberately recognized by the Supreme Court of the United States. Equally clear is the fact that the manipulation of its transmission apparatus which is performed by the radio station's operators is intentional manipulation, performed for the deliberate purpose of achieving radio transmission for words in the instance uttered into the microphone by the outside speaker. It is equally clear as a matter of fact that in this respect it makes no difference in the process of transmission whether or not the sounds transmitted are themselves actually understood by those who do the transmitting, as, for instance, when the speech is delivered in a foreign tongue. The transmission process is identically the same and the intention to perform it is identically the same whether or not the words actually spoken into

² This matter is elaborately examined in the two articles cited in footnote 1 above, which appear, respectively, in the Minnesota Law Review and in the University of Pennsylvania Law Review.

the microphone are understood by the transmitter and whether or not they conform to or depart from the previously approved manuscript.

Paraphrasing Professor Seitz' above quoted language as applied to newspapers, therefore, it is readily apparent that its every application is equally true of radio stations. "For it is clear that the radio station did intend to transmit sounds that in the instance were uttered into the microphone by the advertiser, and that as a result some third person suffered harm to his reputation. Fairness demands that the transmitter respond in damages for the harm caused. Justice should not be restricted just because certain of the sounds thus transmitted carried meanings to their listeners not discoverable in advance by the transmitters even when they exercise the highest degree of care." . . .

The actual physical facts of broadcasting demonstrably reveal the radio station as the transmitter of the defamatory utterances, whether they be extemporaneous interpolations or whether they be contained in previously submitted manuscripts. Accordingly, the facts of transmission being what they actually are, the radio station is a publisher of the defamatory utterances that it actually transmits. Arguments for immunity for radio stations where other publishers would be liable in such cases, no matter what particular phraseology is resorted to by way of rationalization, are therefore arguments for giving radio stations a more favorable position with respect to their defamatory publications than is given to other publishers. Other publishers of defamatory utterances as a matter of course are held liable to their victims under the strict liability of the law of defamation. Such arguments in effect propose that in the matter under examination radio broadcasting publishers of defamatory utterances shall not be liable to their victims unless the facts in the instance can be brought within the much milder rules of the law of negligence.

2. The Ultrahazardous Concept.

The second portion of Professor Seitz' article also questions the aptness of my suggested parallel of cases in radio broadcasting with ultrahazardous activities as defined in sec. 520 of the Restatement of Torts. I had pointed out that, as applied to personal reputation, the radio broadcasting business, at least where outsiders are given access to the microphone, is an activity which certainly involves great risk of serious harm to the victim's personality, a danger which cannot be eliminated by the exercise of the utmost care. Also, I had pointed out, such activity is not such a matter of common usage that it is customarily carried on by the great mass of mankind, or by many people in the community. Professor Seitz does not deny that if these actual facts be recognized they place the radio broadcasting business directly within the range of the Restatement's definition of ultrahazardous activity to which absolute liability is applicable. As escape from this conclusion,

however, he suggests the following: "Strictly interpreted, such definition sustains Professor Vold's viewpoint that radio broadcasting is not an activity of common usage. It is submitted, however, that it is not realistic to separate the broadcasting activity from the receiving activity when we are discussing the matter of common usage in relation to the ultrahazardous theory. . . . there is an interrelationship and interdependence that exists between all the services of radio. It should, for example, be clearly evident that there would be no danger from radio defamation if people did not possess receiving sets. The danger exists because of the interrelation between the broadcasting and receiving activity. Hence, although it is necessary to talk about the liability of a radio broadcaster, when it comes to deciding the matter of common usage, it is suggested that we must view the radio picture as a whole. Such an outlook will lead to the conclusion that the radio broadcaster is participating in an activity of common usage and hence should not be found liable without fault."

How the conclusion thus asserted necessarily follows from viewing the radio picture as a whole is not indicated. It is commonly true that if activities by others be sufficiently eliminated from the facts in the instance no harm will result from the conduct questioned. Even in negligence cases it would be true that were the victim not in the way he wouldn't get hurt. In defamation cases, if others didn't have ears to hear or minds to understand the defamatory words, the speaker's mere utterance of defamatory statements about the party defamed would give rise to no liability. Why listening through a receiving set should on the basis for liability distinguish the radio broadcaster's defamatory utterances from the defamatory utterances of other publishers which reach the minds of listeners or readers through other media is not apparent. Radio receiving sets certainly are not more broadly involved in common usage than are ordinary natural human eyes and ears, and yet the interrelationship and interdependence between ordinary speech and writing and such natural instrumentalities for receiving information does not abrogate liability under the law of defamation in the case of ordinary publishers. As has been repeatedly pointed out in other connections, in this regard defamation by radio is, if anything, even more dangerous than is any other type of defamation.

Moreover, if radio broadcasting is to be removed from the absolute liability field on the Restatement's formula of "common usage" because receiving sets are in common use and the radio picture must be viewed as a whole, it would seem that the same formula for escape from absolute liability is equally available in practically all other types of cases. Most, if not all, of the recognized "ultrahazardous" undertakings constitute parts of a larger mass of activity to which they are related. Few, if any of them, are carried on in an operating or in a business

vacuum without "interrelationship and interdependence" with other services and activities which are matters of common usage. For instance, commercial aviation as practically carried on involves close "interrelationship and interdependence" not only with the practical operation of airports, and with weather bureau operations, but also with other types of connecting transportation and with innumerable other factors that enter into demand for air service on the part of the commercial traffic which is dependent on fast time. Similarly, blasting is used in innumerable situations as part of the operations of mining or of clearing and using land, making of excavations for buildings or roads, etc. All of these are undertakings which, viewed as a whole, are carried on by a great many persons. Here, too, there is much "interrelationship and interdependence" between the ultrahazardous operations and their surrounding related common usage activities. Shall we conclude, therefore, that none of these cases afford proper applications for absolute liability for those portions of these activities which, separately considered, are not matters of common usage and whose exercise does involve risks of serious harm that cannot be eliminated by the exercise of due care?

Rationalization on the far-reaching but uncertain practical problem as to what fields, respectively, negligence and absolute liability are properly applicable as the basis for liability as novel situations arise is still fragmentary and inadequate. I have been impressed, in this connection, with one broad distinction that the available judicial materials in each of these broad groupings tend to indicate which is occasionally mentioned but has not yet been prominently emphasized. It deserves greater emphasis. That is the distinction between the mutuality of activity, advantage, and risk in the negligence cases and the one-sidedness of the activity, advantage, and risk in the absolute liability cases. The well-settled familiar situations where negligence is as a matter of course understood to be the basis for liability commonly involve facts where the activity is mutual, the advantage mutual, and the risk mutual. The outstanding well-settled examples of absolute liability equally prominently involve facts where the activity and advantage are largely or entirely on one side while the incident risk of injury from such activity falls on the other side. Two motorists colliding in the highway illustrate the one. The aviator overhead crashing down on the party on the ground below illustrates the other. This distinction, incidentally, accords with the Restatement's definition which is phrased in terms of "ultrahazardous" and "common usage." The ultrahazardous activities, it can be readily noticed, are commonly one-sided as to activity, advantage, and risk. As such activities become matter of common usage, however, the element of mutuality in these respects also appears.

No single criterion by itself is now familiar on which all questions can be resolved as between negligence or absolute liability as a basis for liability in the instance. Any single criterion can be readily over-rated. It is highly suggestive, however, that mutuality of the activity, advantage, and risk is so largely associated with situations where negligence is held applicable as a matter of course. On the other hand, the more one-sidedness of activity, advantage, and risk is involved in the facts in the instance, the stronger the case tends to be for the application of absolute liability.

When this aspect of the legal materials is viewed in broad perspective, an important element of fairness, of justice, in making a distinction as to liability on that basis is readily recognizable. In the cases involving mutuality in these respects the parties stand relatively equal. Each derives advantage from such activity. Each incurs risk from the other. Each creates risk to the other. Under such circumstances of mutuality, letting the loss lie where it falls unless the actor who causes the damage to the victim is in fault does not violate the fundamental principle of equality of treatment as an element of justice. On the other hand, where the facts involve not mutuality but one-sidedness in these regards, letting the loss lie where it falls unless the actor who causes the damage to his victim is in fault results in the grossest sort of inequality. Under such circumstances the advantage is always with the actor, who reaps the profits from the activity, while the loss is always on the victim who is exposed to risk of injury by the activity which in no direct manner benefits him. "Truth forever on the scaffold, wrong forever on the throne." Where the activity is thus one-sided there is not even the chance that next time the parties may trade places as to advantage and loss in the instance. Here, therefore, even the instinctive, unarticulated sense of justice which broadly permeates the consciousness and conscience of civilized mankind readily recognizes the fairness of requiring that the actor whose activity creates the risk and who derives the advantage therefrom should also bear the burden of the damage which his activity inflicts on his innocent victim.

The bearing of the foregoing discussion on the question as to how the facts of broadcasting are properly to be regarded with respect to the Restatement's formula of "ultrahazardous" and "common usage" would seem to be beyond question. As between the broadcaster and his victim the facts of modern radio transmission conspicuously exemplify onesidedness of activity, advantage, and risk. The activity is that of the broadcaster. The victim is in this matter purely passive. The commercial profit of the activity goes to the broadcaster. The victim in no manner shares in the advantage of broadcasting activity, beyond whatever advantage is available to every person as a member of the public in a community where broadcasting prevails. The risk of damage to reputa-

tion, however, is a risk to which the victim is broadly exposed by the broadcaster's activity, a risk to which the broadcaster is not on his own part exposed by any activity of his victim. In this regard the victim is completely passive, endangering no one. In cases of defamation by radio, therefore, the facts are conspicuously within the range of one-sidedness rather than mutuality. The facts in such cases conspicuously exemplify the type where the injustice of inequality of treatment would result should the actor be given immunity when without fault he does damage to his victim. The facts in such cases conspicuously exemplify the type where the justice of equality requires that he who for his own profit carries on the activity and creates the risks should also bear the burden of damage which his activity inflicts upon his passive and innocent victim.