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Libel and Slander: Defamation by Television Broadcast Is Actionable Per Se

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decided, without reference to the announcements of the State Department. Also, it may result in the deciding of decrees' validity on an International law basis in disputes between former owners of seized property and bona fide purchasers, thus, in effect, spelling out an eventual discarding of the other theories of enforcing or denying enforcement to foreign decrees of expropriation. This will, therefore, cause greater consideration of International law in the Municipal courts than has been given up to now.

SHERIN SCHAPIRO

Libel and Slander: Defamation by Television Broadcast Is Actionable Per Se—As a result of a presentation on a television program known as "The Untouchables," plaintiff, a retired prison guard, brought an action against defendant television companies alleging that they had defamed him by presenting a sequence showing that a prison guard accepted a bribe while attending a prisoner during a railway transfer from a federal prison in Atlanta to Alcatraz. Plaintiff alleged in the Superior Court of Georgia that such production clearly indicated that such Federal officer aided and abetted the Federal prisoner, in this case one Alphonse Capone, in his attempt to unlawfully escape from confinement. Defendants demurrers were overruled and on appeal the Court of Appeals of Georgia affirmed and held that such television presentation was actionable per se as "defamacast" and that plaintiff could maintain the action either by showing that he was the guard specifically referred to or as a member of a two-man group. *American Broadcasting-Paramount Theatres, Inc. v. Simpson.*[1]

The Court of Appeals of Georgia in this decision squarely faced the problem of determining whether defamation by television is to be categorized for purposes of litigation as libel or slander. The court determined that television defamation as such is not easily classified within the age-old torts of libel or slander, and furthermore, that the medium of television has outmoded the principles which form the basis for the distinction between the two actions. Therefore, this court took upon itself the task of establishing a new cause of action uniquely designed to cover situations involving defamation by means of mass media communications. The court has termed this as "defamacast." The rationale which justifies this departure, at least in terms of nomenclature, from the established forms of libel and slander is that modern law must be able to keep pace with modern technological growth. The law of television and radio defamation is quite obviously only as old as the mediums themselves are, and therefore the body of decision law is sparse. The basic distinction between libel and slander has been the

[1] 126 S.E. 2d 873 (Ga. 1962).

written defamation as opposed to the oral defamation.[2] It may be seen at once how inadequate on a definitional basis this distinction has become when we perceive that both radio and television programming may combine both the written word in terms of prepared scripts and the spoken word as finally communicated. Because libel is usually actionable per se without proof of special damages,[3] great pressure has been exerted upon the courts to find that radio and television defamation is a published libel.

The litigation in this field although sparse has been more than casually interesting because the court contenders have usually been celebrities or at least "names in the news" whose reputations have allegedly been damaged. The first well known television defamation case was *Remington v. Bentley*[4] in 1949. In this action the celebrated Miss Bentley while on the "Meet the Press" program reiterated her charges that Mr. Remington was a Communist. The court here referred to an earlier radio defamation case[5] in declaring again that scripted material was libelous. Extemporaneous defamatory matter not contained in a script was previously held to be slander in an even earlier New York case.[6] The court in the *Remington* case appeared to agree with these distinctions as set forth in earlier radio cases and was prepared to cast television defamations into the same mold. However, they were prevented from being completely committed in this direction by deciding that Miss Bentley's defamation was slander but nevertheless actionable since its publication tended to injure Mr. Remington in his profession.[7]

The next case of import was in 1954 again in New York[8] where the court, following the *Remington* decision, held that scripted television defamation was actionable as libel but softened the impact by stating that when a fictional drama is presented, the burden will be upon the plaintiff to show that such defamation was "of or concerning him" to avoid the possibility of coincidental use of names, places, or things. This leads us to the celebrated case of *Shor v. Billingsley.*[9] This 1956 case involved the extemporaneous remarks made by Mr. Billingsley while performing as host on the television program "The Stork Club Show." The court faced the problem of non-scripted television defamation and held that it may be treated as libel rather than slander even though such remarks were never reduced to writing. Both this decision and the Georgia case now under discussion rely heavily upon the opin-

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[2] PROSSER, LAW OF TORTS, §93, P. 584 (2d Ed. 1955).
[3] *Ibid.* See RESTATEMENT, TORTS, §569 (1938).
[4] 88 F.Supp. 166 (S.D.N.Y. 1949).
[5] Hartmann v. Winchell, 296 N.Y. 296, 73 N.E. 2d 30, 171 A.L.R. 759 (1947).
[6] Locke v. Gibbons, 164 Misc. 877, 299 N.Y.S. 188 (1937); *aff'd* 253 App. Div. 887, 2 N.Y.S. 2d 1015 (1938).
[7] *Supra* note 2.
[8] Landau v. C.B.S., 205 Misc. 357, 128 N.Y.S. 2d 254 (1954).
[9] 158 N.Y.S. 2d 476 (1956).

ion of Fuld, J., concurring, in *Hartmann v. Winchell*[10] in which he set forth the rationale that capacity for harm (in this case dissemination by radio) must be more of a governing factor than the older distinction of written and non-written defamations:

> If the base of liability for defamation is to be broadened in the case of radio broadcasting, justification should be sought not in the fiction that reading from a paper ipso facto constitutes a publication by writing, *but in a frank recognition that sound policy* requires such a result. . . . That defamation by radio in the absence of a script or transcription, lacks the measure of durability possessed by written libel, in no wise lessens its *capacity for harm.* Since the element of damage is, historically, the basis of the common law action for defamation . . ., and since it is as reasonable to presume damage from the nature of the medium employed when a slander is broadcast by radio as when published by writing, both logic and policy point the conclusion that defamation by radio should be actionable per se.[11] [emphasis by the court].

Today the Georgia court has gone one step further and has put a new label on a principle which other cases have suggested: that policy requirements of the law demand a departure from common law rules, that mass media communication is radically different from anything which the common law could regard as a vehicle for the transmission of slanders, that because of the scope and magnitude of the harm and because of the mixture between spoken and written words—for all these reasons there is a need for a new classification of tort defamation to apply to television broadcasting and that classification Judge Eberhardt and his colleagues prefer to label "defamacast."[12]

The question now presents itself as to the impact of such a new classification both upon the substantive law requirements of actionable defamation, and upon the possible strict liability which may be imposed upon television broadcasters. In the *Simpson* case, now under discussion, the problem was not faced and the only clue we have to future action is this footnote comment made after indicating that "defamacast" is actionable per se:

> The libel and slander classification case law is not controlling in such a category. However, the great body of the case law will not become obsolete in the area because certain principles such as what is defamatory, what is privileged and so forth will continue to apply. A more complete development of the rules dealing with "defamacast" will of necessity await later cases.[13]

At first glance it might well appear that television broadcasters had better look to their insurers, since the likelihood of the imposition of

[10] *Supra* note 4.
[11] *Supra* note 1, at 879.
[12] *Supra* note 1, at 879.
[13] *Supra* note 1, at 879.

strict liability could well be inferred from this current decision. This would be in contradistinction to the modern trend away from strict liability principles, as Dean Prosser points out,[14] even though he goes on to say:

> In view of its enormous potentialities for harm, there seems to be little reason to distinguish the radio from the newspaper; and so long as strict liability remains in the law of libel, it is at least arguable that the radio beyond all other media should be subject to it.[15]

This writer is convinced the same argument would apply to television broadcasting as well as to radio.

Before finally committing oneself to a position, two other factual conditions should be examined in addition to "capacity for harm" which has already been treated in relation to the "defamacast" opinion. One is that the Georgia Court took notice of the fact that the presentation in the case at bar was of a "stale" news event as opposed to a "current" one; this condition coupled with the fact that the program was only for profit-making purposes may serve to qualify the decision of the court. Future cases may be distinguished on the basis that their factual considerations involve either public service programming or timely current events.

One final consideration must be given to the concept of the "deepest pocket" theory which is embodied in the rationale of "capacity for harm." Indeed, the theory of placing the burden of loss on the one party who can most readily absorb it is not new to the law. However, as Dean Prosser again points out:

> Courts have been reluctant to saddle an industry with the entire burden of the harm it may cause, for fear that it may prove ruinously heavy. This is particularly true where the liability may extend . . . to a *new industry, which may be unduly hampered in its development*. . . .[16] [Emphasis added]

The full import of the *Simpson* case will probably not be felt for many years, however, it cannot be denied that the court is making progress in clearing up the long-standing confusion between libel and slander by insisting that television defamation shall be actionable per se without proof of special damages.

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[14] *Supra* note 2, §94, p. 603.
[15] *Supra* note 2, at 606.
[16] *Supra* note 2, at 20.