Responsibility of Radio Stations For Extemporaneous Defamation

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I. NON-CONSENT AS AN ELEMENT IN DETERMINING LIABILITY

A recent argument made in behalf of imposing absolute liability on radio broadcasting companies, in cases where an extemporaneous defamatory remark (i.e., a departure from a previously submitted manuscript) is made by an employee of someone who buys time on the air, focuses attention upon the question as to whether consent of defendants to publish has been so self-evident in defamation cases as to cause its importance to be forgotten. The first part of this article is written on the assumption that the answer must be in the affirmative.

Footnote:

1 This article has as its sole objective the discussion of the liability of radio broadcasting stations under the special circumstances clearly indicated. It is not the writer's intent to touch upon the liability of concerns which buy time on the air. Nor is it the purpose of this article to analyze the station's liability for a defamatory remark which is read from the manuscript or its liability when it dispenses with previous submission of the script, or when it joins a chain program and consequently may never see the script. On these three latter points, Vold's discussion, cited note 2, infra, is logical and clear.
It is common to find that in various divisions of the law case congestion quite often develops around the area covered by a word or phrase. For a brief substantiation, recall the significance of "right to control" in litigation raising the independent contractor question, of "unlawful act" in controversy bringing up the battery issue, and of "duty and foreseeability" in legal cause tort conflicts. In the field of defamation the word "intention" has received a considerable share of judicial cognizance. This clearly has been true in the cases involving the liability of newspapers for publishing defamatory statements.

It is in that sphere that the courts and authorities emphatically lay down the rule that one who publishes defamatory matter of another is not relieved from liability because he did not intend the matter so published to be understood as defamatory. And the rule is adhered to even when it appears that a defendant neither knew nor by the exercise of every possible precaution could have known that a published statement would be understood as defamatory. Hence if a newspaper were to falsely publish in its birth column a statement that B's wife had given birth to a baby boy, the newspaper would be liable although the proprietor or employees of the newspaper neither knew nor had reason to know that B and his wife had been married but one month. Because of such an attitude, writers have been influenced to refer to the law of defamation as involving in some of its aspects absolute liability or liability without fault. In coming to such a conclusion, reasoning has not disregarded logic. For it is 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


5 Torts Restatement (1938) § 580. See particularly comment (c) on the matter of newspaper liability; Harper, Torts, par. 237 (1935).


7 It is, of course, obvious that a newspaper company could not defend on the ground an employee had been negligent. Hence it is accurate to say that the newspaper company intended to publish what appeared in print.
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. Judges are only doing the natural thing when they fail to put emphasis on the evident. Nor is such a pattern for judicial expression employed solely in the field of defamation. It is common for the judiciary to place stress upon concepts which need clarification and to pass over essential but apparent doctrine.

Nowhere is such an attitude more capable of demonstration than in tort cases involving negligence. In that area all tribunals recognize the basic rule that liability results only when a defendant has a duty to use reasonable care not to harm a specific person or a general class of persons. All are aware, however, that in numerous negligence cases the court does not say a word about duty. That is not because duty is not essential, but because its presence is so self-evident. But just as soon as a set of facts comes into being in which duty is not apparent, the court gives adequate and extensive treatment to a discussion of the necessity of finding it, and takes a stand upon its presence or absence in the specific litigation. Justice Cardozo's opinion in Palsgraf v. Long Island R. R. Co. is an excellent illustration of such technique. When faced with a factual situation giving rise to a doubt as to the existence of a duty to plaintiff, Cardozo did not hesitate to discuss the whole duty philosophy.

Basing prediction upon such observable conduct, it would seem that the courts should accept the responsibility for discussing the importance of consent when they meet with a radio case involving a defamatory interpolation. The fact that the consent element was neglected in the only case involving such a background which has to date come to the attention of any court is not significant as tending to destroy the supposition. This is true, because under Pennsylvania law there could be no such thing as the doctrine of liability without fault controlling the decision in a defamation case. Hence there was no need for the court to discuss or dispose of the consent element before making up its mind as to whether absolute liability should be imposed.

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8 But to understand the possibility of various views, see Smith, Jones v. Hulton: Three Conflicting Judicial Views as to a Question of Defamation (1912) 60 U. of Pa. L. Rev. 365, and cases cited in a note (1939) 24 Minn. L. Rev. 118.
9 Harper, Torts, par. 8 and 73 (1935).
10 Examples are so many as not to require citation. But for brief substantiation, note Wagner v. International R. R. Co., 232 N.Y. 176, 133 N.E. 437 (1921). There Cardozo wrote the opinion just as he did in the Palsgraf case, infra, note 11.
13 Supra, note 12.
But in those more numerous jurisdictions where the law of defamation can involve absolute liability under a factual situation such as disclosed by the case of Summit Hotel Co. v. National Broadcasting Co., it should be difficult for the court not to face the issue of consent as related to the matter of absolute liability for an extemporaneous defamatory utterance. Furthermore, since this type of liability without fault is not supported by the philosophy emerging from the ultra-hazardous activity concept, it is submitted that a discussion of the consent element is inescapable.

The underlying thesis of this part of the article is that there would be no such thing as absolute liability in connection with the law of defamation if we could not find a consent to the publishing of a particular statement. 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. (Neither can the broadcasting station in what is truly an analogous situation growing out of the utterance of something in the manuscript which turns out to be defamatory.) 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 much better position as regards consent to publish. The newspaper publisher did consent; the broadcaster did not.

To demonstrate the significance of defendant's consent in connection with the attaching of liability, it will be appropriate to refer to a field where by statute owners of automobiles are made liable for the negligence of persons operating a car with the owner's consent.

14 Supra, note 6. In this connection it should be understood that this type of absolute liability is not based upon the foundation of an ultra-hazardous activity.

15 (Pa. 1939) 8 A. (2d) 302.

16 Vold, Defamatory Interpolations in Radio Broadcasts (1940) 88 U. of Pa. L. Rev. 276. It is recognized that without specifically mentioning consent by name, Vold finds an implied consent emerging out of the fact that permission was given to use the station facilities, and the impossibility of preventing an interpolation. For reasons to be stated later, the writer cannot agree that there has been consent of the type described in this article.

17 For an excellent discussion and analysis of such statutes, see a note at (1937) 21 Minn. L. Rev. 823.
obvious that the intent of such legislation is to impose a qualified form of absolute liability upon the owners of motor vehicles where none existed at common law. For the first time owners who had before been liable only under the principle of respondeat superior\(^{18}\) or the family purpose doctrine\(^{19}\) became liable for the negligence of one to whom an automobile had been entrusted by the owner in situations where the relation of master and servant, principal and agent, husband and wife, parent and child\(^{20}\) did not exist. However, liability did not result in cases where the owner's consent had been exceeded.\(^{21}\)

But a pertinent question demands attention at this place. What might be asked is the connection between consent in the area of extemporaneous defamation over the radio and consent to operate an automobile as the term is used in statutes imposing liability on automobile owners. The tie-up is not obscure when analyzed. If the thesis of this article in respect to the necessity of considering consent in the area of defamation covered by this discussion is accepted, it then becomes apparent that the decisions under the automobile owner's liability statutes can be used to illustrate the importance of consent as effecting ultimate results. The automobile cases are particularly valid because they arise in a division of the law where a form of quasi-absolute liability has been imposed on car owners.\(^{22}\) And the radio defamation cases appear, as has been previously indicated, in an area of the law which in some of its aspects involves liability without fault. It is, of course, true that in the automobile situation the consent is made important by statute. However, it is submitted that the legislature in creating the statute responded to the influence of natural logic in realizing that a man should not be held absolutely liable if he does not consent to the use of an instrument which he owns and which makes the harm possible.

Such reasoning leads directly back to the fundamental proposition touched upon in this article. Factually it is clear that the radio station did consent that an advertiser or his employee be allowed to use the broadcast facilities. Still and in spite of argument to the contrary,\(^{23}\) it seems certain that the radio station only permitted use in accordance with its consent. And, as is evident, the consent was only to broadcast


\(^{20}\) For other instances where because of the relationship of the parties the family purpose doctrine has been applied, see Smart v. Bissonette, 106 Conn. 447, 138 Atl. 365 (1927).

\(^{21}\) Robinson v. Shell Petroleum Corp., 217 Iowa 1252, 251 N.W. 613 (1933).

\(^{22}\) The car owners are liable even when they are not personally negligent.

\(^{23}\) Supra, note 2.
a program which did not deviate from a previously submitted manuscript. 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 a 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." It seems more logical to recognize that use by permission can be exceeded to such an extent as to vitiate consent. Such is certainly the attitude of the courts in adjudication arising out of the automobile owner's liability statutes. Decisions have held that if an owner consents to the use or operation of his vehicle for a definite period of time, and the use or operation is extended past that period of time, damages cannot be recovered. Results have been the same if the automobile is used or operated in a place different from that for which the consent is granted. Many other illustrations as to the effect of exceeding consent can be drawn from the cases in which a servant while driving his master's automobile in his master's business, deviates from the exact scope of his employment.

In refutation of material just presented, it may be contended that the owner of an automobile cannot place limitations upon his consent as to the manner of operating his car. Hence an instruction concerning speeding or careless pilotage of the vehicle would not destroy the permission to use the automobile. Consequently, the argument may run that by analogy a caution not to depart from a manuscript would not vitiate consent.

It would seem, however, that protagonists of such a view would be wrong. There appears to be a clear cut distinction between the two situations. In the automobile cases a restriction is good which forbids the doing of an intentional act and no good if it merely forbids the doing of a negligent act. Applying such a rule to the radio field, it becomes apparent that a departure from a manuscript is an intentional rather than a negligent act. Hence such departure should vitiate the consent given and free the broadcasting station from liability.

It seems well at this time to summarize what has been discussed. This can be done by stating that because of the importance of con-

sent, it would seem that courts should not impose liability upon broadcasting stations on the theory that they are required to do so because the law of defamation in some of its aspects involves liability without fault.

II. ULTRAHAZARDOUS CONCEPT AS AN ELEMENT IN DETERMINING LIABILITY.

Now we pass to another phase of the discussion. There is another basis upon which it is possible to predicate the liability of a radio station. For the suggestion has been made that radio broadcasting be classed as an ultrahazardous activity of the type which would have attached to it absolute liability for harm caused. The remaining part of this article will concern itself with an analysis of such idea.

The task will not be easy. For in the words of Professor Harper:28

"Current statements of the law of strict liability are extraordinarily unsatisfactory. The paucity of scientific exposition of the law in this field has made it so difficult to comprehend the appropriate scope of the principles of liability involved that courts are frequently at a loss adequately to rationalize their judgments. This inadequacy of exposition is so marked that as ingenious a scholar as Salmond is forced to state the rule of absolute liability in a somewhat generalized way, and then set forth a long list of of 'exceptions' to the generalizations."

Because of such a situation, it is not difficult to work out a logical argument for liability. No one, therefore, can seriously challenge much of Professor Vold's reasoning to the effect that broadcasting is an ultrahazardous activity. It is hard to attack argument based upon general principles capable of various applications. Specifically it is difficult not to admit that defamation over the radio can cause great harm, that it is impossible to entirely do away with the danger of interpolations, and that the broadcasting company has it within its power to arrange for self protection through indemnity insurance. The first two of the previous contentions are unanswerable. The last argument—in many respects the most appealing of the three—certainly should not be controlling. It is submitted that the Pennsylvania Court in Summit Hotel Co. v. National Broadcasting Co.21 is right when it criticizes such an attitude through the following reasoning:

"This is the weakest of all the arguments (i.e., contending for absolute liability) and begs the question. It is indeed a new

27 Again by Professor Vold in the article cited supra, note 2.
29 This is also true of much law review material.
31 (Pa. 1939) 8 A. (2d) 302.
theory that a substantive rule of law should be based upon the possibilities of an indemnifying bond to save an innocent person from loss. If an indemnifying bond is to be the basis of judgment, then in all actions for personal injury it would be well to establish a general rule of absolute liability, requiring the party to be held liable without fault to take out a bond."

But even if all of the arguments are admitted to be difficult of refutation and to convey appealing philosophy, the realism of Professor Harper's observation\textsuperscript{32} is not escapable. For, as Harper clearly implies, in the last analysis an "exception" rather than a generalization is likely to be controlling in a decision as to whether a particular activity is ultrahazardous.

It was, for instance, an exception to the generalizations of the ultrahazardous activity doctrine that removed the automobile from within the rule. For the authorities recognized that since the automobile was a thing of common usage\textsuperscript{33} it would not be wise to call its operation an ultrahazardous activity.

Since, therefore, activities of common usage can fall without the ultrahazardous principle, it is appropriate to reflect upon whether or not radio broadcasting is an activity of common usage. Such investigation seems imperative before deciding whether radio stations should be declared absolutely liable for extemporaneous defamatory utterances of the type dealt with in this paper.

As the Restatement explains it,\textsuperscript{34} an activity is a matter of common usage if it is customarily carried on by the great mass of mankind or by many people in the community. Strictly interpreted, such definition sustains Professor Vold's viewpoint\textsuperscript{35} 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. For as Sarnoff puts it in an article in \textit{Air Law Review}\textsuperscript{36} there is an interrelationship and interdependence that exists between all the services of radio.\textsuperscript{37} 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

\textsuperscript{32} \textit{Supra}, note 28.
\textsuperscript{33} \textit{3 Torts, Restatement} (1938) § 520. See particularly comment on clause (b) in regard to common usage.
\textsuperscript{34} \textit{Supra}, note 33.
\textsuperscript{35} \textit{Supra}, note 30.
\textsuperscript{36} \textit{Network Broadcasting} (1939) 10 \textit{Air L. Rev.} 15.
\textsuperscript{37} The writer wishes to acknowledge the help of Mr. Lee Smith, Junior in \textit{The Creighton University Law School}, for checking legal literature as to the point involved.
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.

As another reason for not imposing absolutely liability upon the broadcaster, it seems valid to point out that to date there have been very few cases of extemporaneous defamation over the radio. Such a fact would tend to indicate that the radio station can use care which will make it reasonably certain that there will be no departure from the manuscript thus there does not seem to be a need for imposing absolute liability on radio stations.38

In conclusion and by way of repetition, the writer once more wishes to make clear that he does not feel that radio stations are entitled to greater favors than other publishers. Under facts analogous to the publication of defamatory matter in the newspaper (a defamatory statement in a radio manuscript) it is felt the radio station should be liable. On the other hand, when confronted by the factual situation covered by this analysis, it is believed that there is no need for the extension of the absolute liability coverage.

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38 Such is the thought expressed in notes at (1939) 15 IND. LAW J. 154, and (1940) 38 MICH. LAW REV. 415.