8-1-1970

Defamation by Radio and Television A Theoretical Construct of Defamacast as a New Tort

Martin A. Grindeland

DEFAMATION BY RADIO AND TELEVISION

A THEORETICAL CONSTRUCT OF DEFAMACAST AS A NEW TORT

by
Martin A. Grindeland

Bachelor of Science, Mayville State College 1968

A Thesis

Submitted to the Faculty

of the

University of North Dakota

in partial fulfillment of the requirements

for the degree of

Master of Arts

Grand Forks, North Dakota

August
1970

This Thesis submitted by Martin A. Grindeland in partial fulfillment of the requirements for the Degree of Master of Arts from the University of North Dakota is hereby approved by the Faculty Advisory Committee under whom the work has been done.

_____
(Chairman)

_____

_____

_____
Dean of the Graduate School

PERMISSION

Title_____

Department_____

Degree_____

In presenting this thesis in partial fulfillment of the requirements for a graduate degree from the University of North Dakota, I agree that the Library of this University shall make it freely available for inspection. I further agree that permission for extensive copying for scholarly purposes may be granted by the professor who supervised my thesis work or, in his absence, by the Chairman of the Department or the Dean of the Graduate School. It is understood that any copying or publication or other use of this thesis or part thereof for financial gain shall not be allowed without my written permission. It is also understood that due recognition shall be given to me and to the University of North Dakota in any scholarly use which may be made of any material in my thesis.

Signature_____

Date_____

ACKNOWLEDGMENTS

Although many factors influenced my decision to conduct this legal research, only the guidance and cooperation of my graduate committee enabled me to complete this project. The spirit of dedication and professionalism which each committee member displayed should be acknowledged. To my committee chairman, Mr. Myron Curry, I extend special gratitude for a warm and sincere contribution in the form of suggestions, analysis, and motivation. To Dr. W. Barnett Pearce and Dr. Bernard Brommel, I express my appreciation for needed suggestions, appropriate insights, and professional ideals.

Special thanks to the attorneys and law students who read this thesis for legal accuracy, friends and associates who were helpful and cooperative during this period of research, and Mrs. Myrna Kowalski for her efforts and skill in typing this manuscript.

Iago. "Good name in man and woman, dear my lord,
Is the immediate jewel of their souls;
Who steals my purse steals trash; 'tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed."

Othello, The Moor of Venice, Act III, Scene III

INTRODUCTION

The media of radio and television permits a single voice to express a particular idea at a given time to a large cross section of the population with significant effects. When this voice utters a defamatory imputation, the effects of the broadcast upon the reputation of an innocent bystander becomes a matter of litigation. Although litigation should balance the interests between free speech and the rights of the individual traduced, this is not always the case. Unfortunately, our legal system is so firmly grounded in the court decisions and laws of the past, that adaptation to the twentieth century phenomena of radio and television has resulted in anomolous distinctions and categories. These distinctions and categories require courts to decide whether a defamatory broadcast is slanderous per se, slanderous per quod, libelous per se, or libelous per quod; whether the broadcaster should be held accountable for strict liability or due care negligence; whether the defamed party should be allowed to collect general, special, or exemplary damages; whether a retraction statute is applicable; or whether yet additional legal categories may apply.

A significant number of legal writers have found these rigid distinctions and categories inappropriate for radio

and television.(1) To remedy the situation they have called for the establishment of a new tort which would completely overhaul the rules of defamation applicable to radio and television.(2) A 1962 Georgia Appellate Court in American Broadcasting-Paramount Theatres, Inc. v. Simpson made recognizable progress toward this goal by holding that defamation by radio or television falls into a new category, defamacast, and is actionable per se.(3) Although that decision was only a beginning of what needs to be done, it established a precedent from which courts and legislators may be stimulated to establish specific criteria for defamation by broadcast. Thus, as Henry the VII established the law of libel with the advent of the printing press,(4) courts and legislators today should establish the law of defamacast to account for the unique aspects of radio and television.

Purpose

The purpose of this study is to provide a theoretical definition of defamacast (as a new tort) to assist broadcasters in understanding present broadcast defamation laws, and to provide useful information and suggestions for the formulation of new defamacast laws. The study will recognize defamacast as a new tort, distinct from libel and slander, cognizant of the effects of radio and television, and extracted from applicable legal principles. Broadcasters, jurists, legislators and the general public should benefit from a clear conceptual development of this con-

fusing and irrational area of tort law.

Review of the Literature

Several doctoral dissertations have made contributions to this area of study. Joseph Keller's doctorate of law dissertation, "Federal Control of Defamation by Radio," from Georgetown University in 1935 presented the need and feasibility for a federal law of broadcast defamation. Robert McMahon's "Federal Regulation of the Radio and Television Broadcast Industry in the United States, 1957-59 with Special Reference to the Establishment and Operation of Workable Administration Standards" from Ohio State University in 1959 and William McDougald's "Federal Regulation of Political Broadcasting: A History and Analysis" from Ohio State University in 1964 considered the feasibility and practicality of federal regulations and interference. Robert Bliss analyzed the implications of the New York Times' case which extended the actual malice standard to reports concerning public officials in "Some Implications for Mass Communications of New York Times Company v. Sullivan" from the University of Iowa in 1967. It should be noted, however, that with the exception of Joseph Keller's 1935 study, these studies have been primarily designed to interpret the meaning of the law rather than to evaluate the law and suggest change.

Several master's theses have contributed research concerning the laws of broadcast defamation. In 1959

Eugene Brott at the University of Illinois summarized the "Statutes Concerning Broadcast Defamation." In 1960 Robert Morgan at Boston University studied "Section 315 of the Communications Act of 1934: An Overview of the Development of Political Broadcast Defamation." In 1962 William Shilstone at Stanford University evaluated "Privacy and Privilege: How California Courts Have Defined and Limited the Right of Privacy." Of these studies, William Shilstone's, to a greater extent than the others, goes beyond interpretation of the law to suggest needed revisions. Unfortunately, the right of privacy is only remotely related to defamation by broadcast, and Mr. Shilstone's study is confined to suggestions for California. Thus, a critical evaluation of the laws of broadcast defamation, coupled with proposed innovations, will provide a fresh approach for research in this area.

Scope

A fictitious illustration of broadcast defamation in a 1964 Mercer Law Review comment reveals a few of the complexities in defamation by radio or television:

> The popularity ratings of the television program continued to decline. The sponsors were insistent. They demanded a program capable of attracting the public interest and capturing the nationwide television audience. The emcee of the program made one last effort. He began his program by joking about a well-known personality. Then, warming to the subject, he began to tell derogatory stories about this individual. Were they true? The emcee did not know nor did he care. But he did know that he had

> everything to gain and nothing to lose. If the maltreated person desired to rectify the situation, it would involve a lengthy court-room procedure and the ambiguous and unpredictable rules of defamation were on the defendant's side. Let him try to prove it![5]

Although this illustration is not all-inclusive of the variables involved in broadcast defamation, it raises the following questions: Was a tort committed? If so, was it slander, libel, or defamacast? Should the maltreated person be required to prove damages or were the statements defamatory per se? Could gestures, vocal intonations, and camera shots be considered defamatory? Does a broadcaster assume strict liability or need he only exercise due care? These are some of the many questions which invariably are asked when defamation occurs by radio or television. This study will attempt to answer such questions through a theoretical construction of defamacast as a new tort.

Organization

The study is divided into three sections: (1) the origin and development of slander and libel with applications to radio and television; (2) the extraction of applicable legal principles and explanation of the function of those principles; and (3) the implications of the theoretical concepts of defamacast as a new tort.

The first chapter will trace the development of slander and libel with the following considerations: the origin of slander and libel, the slander-libel distinction, the application to radio and television, the reasons for

concern with our present broadcast defamation laws, and the suggestions for revamping of those laws.

The second chapter will provide a basis for the construction of a theoretical definition of defamacast through explanations of the functions of applicable legal principles. These legal principles which are inherent in the law of broadcast defamation frequently overlap and occasionally conflict, making the extraction of certain workable principles a worthwhile task. Advantages and disadvantages of various approaches to the law will be considered.

The third chapter will construct a theoretical definition of defamacast based upon the implicatory dimensions extracted in the second chapter. The new tort will be defined in terms of a concept with related lower level concepts, in the form of a model federal statute, and in the form of examples in a hypothetical situation.

Definitions (6)

Absolute Privilege--An absolute privilege protects the publisher or disseminator of defamatory imputations from liability without reference to his motives or the truth or falsity of the statement.

Contacts Approach--Determines which state provides the most contributing variables and applies that state's law.

Defamacast--Defamation by broadcast.

Defamation--The taking from one's reputation. The offense of injuring a person's character, fame, or reputation by false and malicious statements. The term includes both libel and slander.

Exemplary Damages--An increased award in view of aggravation of the injury by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant, and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong, or else to punish the defendant for his evil behavior or to make an example of him.

General Damages--General damages are such as the law itself implies or presumes to have accrued from the wrong complained of, for the reason that they are its immediate, direct, and proximate result, or such as necessarily result from the injury, or such as did in fact result from the wrong, directly and proximately, and without reference to the special character, condition, or circumstances of the plaintiff.

Lex Loci Delecti--The law of the place where a tort is committed.

Libel Per Quod--They are those expressions which are not actionable upon their face, but which become so by reason of the peculiar situation or occasion upon which the words are written.

Libel Per Se--A publication is rendered libelous per se when words are of such a character that a presumption of law will arise therefrom that the plaintiff has been degraded in his reputation and has suffered damage.

Negligence--The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do.

Qualified Privilege--A qualified or conditional privilege protects a publisher or disseminator from liability unless actual malice or wrongful intent is shown.

Reply--A right of reply permits an alledgedly defamed individual to use the broadcasting facilities from which an imputation eminated concerning his reputation, to reply to the imputations.

Res Ipsa Loquitor--The thing speaks for itself. Rebuttable presumption that the defendant was negligent, which arises upon proof that instrumentality causing injury was in the defendant's exclusive control, and that the accident was one which ordinarily does not happen in absence of negligence.

Retraction Statement--A broadcasted statement which serves as a complete and unequivocal denial of the validity with regard to an imputation concerning an individual in a previous broadcast.

Single Publication Rule--Treats a defamatory broadcast as one publication whereby the plaintiff is allowed to plead and prove a general distribution of the imputation.

Slander Per Quod--Slanderous words which require proof of special damages.

Slander Per Se--Slanderous in itself. Words which are slanderous without proof of special damages.

Special Damages--Those which are the actual, but not the necessary, result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case, that is, by reason of special circumstances or conditions.

Strict Liability--Liability without fault. Case is one of "strict liability" when neither care nor negligence, neither good nor bad faith, neither knowledge nor ignorance will save defendant.

Tort--A private or civil wrong or injury independent of contract. Three elements of every tort action are: Existence of legal duty from defendant to plaintiff, breach of duty, and damage as proximate result.

CHAPTER 1

SLANDER AND LIBEL

FROM THE SOUND WAVE TO THE ELECTRON

General Background

The law of defamation is concerned with the "taking from one's reputation" typically through injuries to "a person's character, fame, or reputation by false and malicious statements."(7) Defamation invades an individual's interests and good name in a relational manner, as the harm involves the opinions that others may have of the plaintiff.(8) "Speaking generally, the law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit."(9) The tort necessitates publication of the defamatory matter to someone in addition to the plaintiff. Thus, derogatory and insulting remarks directed to the plaintiff may form a cause of action for "intentional infliction of mental suffering," but unless they are communicated to someone other than the defamed there can be no action for defamation.(10)

Defamation consists of the twin torts--slander and libel. In theory slander usually is oral,(11) while libel is written;(12) however, in practice each has developed

additional rules and distinctions which have become increasingly contradictory and anomalous.(13) As Prosser notes,

> The explanation is in part one of historical accident and survival, in part one of the conflict of opposing ideas of policy in which our traditional notions of freedom of expression have collided violently with sympathy for the victim traduced and indignation at the maligning tongue.(14)

Many of these conflicting rules and irrational distinctions are explainable only in light of their historical development.

Origin of Slander and Libel

As long ago as the Anglo Saxon period, remedies for defamation existed.(15) Before the sixteenth century, actions for defamation were tried in the local Seignorial courts with common law courts taking no jurisdiction.(16) After the local Seignorial courts lost their influence, the ecclesiastical courts accepted jurisdiction and regarded defamation as a sin punishable by penance.(17) As these courts in turn lost their power, tort actions for slander reverted back to the common law courts in a slow, but steady process. Jurisdictional squabbles between the two tribunals caused common law courts to hold that unless "temporal" damage could be proved, defamation was a "spiritual" matter which should be left to the church.(18) Eventually, the common law courts received jurisdiction over slander; however, the judges became "annoyed and dismayed"(19) by the

unexpected flood of actions and established rigid distinctions in their efforts to hedge the remedy.

Court of Star Chamber

With the introduction of the printing press, civil actions for defamation became inadequate to suppress seditious religious and political publications.(20) As a result Henry the VII created the Court of Star Chamber to punish the new crime of libel. The Star Chamber was a criminal court of equity made up of the highest officers in the state with jurisdiction over political and eventually non-political libels(21) for the purpose of providing a legal remedy to avoid duels and disturbances of the peace.(22) Although the Star Chamber was abolished in 1640,(23) jurisdiction passed to the common law courts with the distinction between oral and written defamation still intact.(24)

Thorely v. Lord Kerry

Libel was officially declared as a tort by the 1670 King v. Lake case in which the plaintiff alledged that a petition prepared by King was "stuffed with illegal assertions, ineptitudes, and solecisms."(25) The court held that "although such general words spoken once without writing or publishing them would not be actionable, yet here, they being writ and published which contains more malice than if it had been spoken, they are actionable." In Harman v.

Delany the court added to this reasoning by noting that a "Word published in writing will be actionable--which would not be so from a bare speaking of the words, because libel perpetuates and dispenses the scandal."(26) The distinctions between slander and libel were firmly welded to the law by the case of Thorely v. Lord Kerry in 1812, in which Sir James Mansfield recognized the established, yet indefensible distinction in these words: "if the matter were for the first time decided this day, I should have no hesitation in saying that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken."(27) Hence, the distinction between slander and libel was recognized as indefensible in the 19th century; however, it had already been established beyond repudiation in the law of defamation.

Slander-libel Distinction

In today's courts, slander and libel are distinguished primarily for the purpose of determining the amount of evidence necessary to prove the plaintiff's claim. Slander per se and libel per se do not require the plaintiff to prove special or actual damages as these damages are assumed. Slander per quod and libel per quod, however, usually require the plaintiff to prove actual damages or harm to his reputation.

Slander Per Se

Slander requires that actual damages be proved with certain exceptions: the imputation of a crime; the imputation of a loathsome disease; imputations affecting the plaintiff in his trade, business, profession, or office; and in most jurisdictions, imputation of unchastity concerning a woman.(28) These categories of slander require no proof of actual harm to the reputation of the plaintiff, but rather such harm is presumed.

Imputation of a Crime. An imputation of a crime may occur through the accusation that a person is guilty of a crime subject to corporal punishment in England,(29) with the additional requirement that it be subject to indictment in the United States,(30) and that the offense involve an "infamous" or "disgraceful" punishment in jurisdictions such as New York.(31) Most jurisdictions now require that the crime be one which involves "moral turpitude."(32) As Prosser notes, not every assault and battery involves "moral turpitude," but the accusation that the plaintiff beat his mother does.(33) Thus, the courts appear to be moving toward a standard of "major social disgrace"(34) where even the exact crime need not be identified:(35) words such as "thief,"(36) "pimp,"(37) and "bootlegger"(38) have been held to be sufficient imputations of a crime.

Imputation of a Loathsome Disease. An imputation of a loathsome disease may cause a person to be excluded from

society.(39) For this reason courts recognized accusations of venereal disease(40) and leprosy(41) as especially damaging to one's reputation. On the other hand, a disease such as smallpox was recognized as resulting in either recovery or death, and therefore would not result in the same social avoidance of one who had recovered from the disease.(42) For this reason smallpox, insanity,(43) tuberculosis,(44) and many other communicable diseases are not included. Similarly, allegations that one has had venereal disease in the past would require proof of actual harm for damages to be awarded.(45)

Imputation Affecting the Plaintiff in His Trade. Provided that the plaintiff is engaged or about to be engaged in a business or trade,(46) words which harm the plaintiff in regard to his job are actionable without proof of damage. Thus it is actionable without proof of damage to allege that a physician is a butcher,(47) that an attorney is a shyster,(48) that a school teacher is guilty of improper conduct with his pupils,(49) or that a chauffeur is habitually drinking.(50) In a contrary vein, it has been held not to be actionable without proof of damage to allege that a physician has committed adultery,(51) that an attorney has lost thousands of dollars,(52) or that a dancing teacher has been drunk(53) since in these instances the plaintiff might not be harmed in his job.

Imputation of Unchastity Concerning a Woman. Most courts have held that "imputation of unchastity to a woman is actionable without proof of damage, without regard to whether it charges a crime."(54) This rule has never been applied to a man since the damage to his reputation would not be as great;(55) however, several courts have held that accusations of unchastity to either sex is equivalent to a charge of fornication or adultery which involves moral turpitude.(56) Prosser notes that although the question has not arisen, "it appears very likely ... that the imputation of homosexuality to either sex would be held to constitute a fifth category, actionable without proof of damage."

Slander Per Quod

Slanderous words which do not fit into one of these four categories are slanderous per quod, not slanderous in and of themselves, and require proof of actual (special) damages. Special damages refer to definite, concrete, and specific proof of injury(57) usually requiring an additional proof of pecuniary loss.(58) Accusations that a plaintiff is a bastard,(59) a damned liar,(60) a Communist,(61) or that he wets in his bed(62) will provide a cause of action through proof of a pecuniary loss. Once the cause of action has been brought by the plaintiff, additional damages may be collected for injuries to the plaintiff's reputation,(63) wounded feelings and humiliation,(64) resulting physical

illness and pain,(65) and even future damages of this nature.(66) Damages are usually limited to those which are reasonably foreseeable as the "proximate cause" of the accusation.(67) Hence, unless the slanderous words fit into one of the four slander per se categories, actual damages must be pleaded and proved.

Libel Per Se and Per Quod

Libelous words as determined by the common law courts were actionable without the necessity of pleading or proving damages suffered by the plaintiff. Such damage was assumed from the publication of the libel.(68) For this reason the majority of jurisdictions do not require that damages be proved where the "publication is defamatory upon its face" (libel per se);(69) however, in cases where extrinsic facts are needed to interpret the meaning of the words (libel per quod), the courts have held that this libel should be treated like slander.(70)

Expansion of Slander and Libel

From the preceding development of the distinctions between slander and libel it can be seen that the difference between the two torts involves more than oral and written defamation, but rather encompasses the entire spectrum of evidence requirements in a defamation suit. At first, these distinctions had an obvious advantage for simplicity and ease of application; however, eventually the common law encountered new modes of defamation,

thereby forcing slander and libel to expand. Thus, libel was found in pictures,(71) signs,(72) statues;(73) and burning(74) or hanging(75) the plaintiff in effigy, building a gibbet in front of his house,(76) and dishonoring his valid check.(77) One court held that to hang a lantern at the front door of a home of a respectable woman was libel.(78) Similarily, defamatory gestures of a deaf mute were considered slander,(79) while oral communication reduced to writing as stenographic dictations(80) and telegrams(81) was considered libel.

Search for a Test

This expansion of the law to include more than face to face talking for slander and more than writing and printing for libel invalidated the traditional oral-written distinction. Scholars began looking for a new basis of distinction and for a time concluded that libel was communicated by sight and slander by sound.(82) With the realization that the sight-sound test was insufficient,(83) legal theorists moved toward the "permanency of form"(84) and "magnitude of the potential harm"(85) standards.

The permanency of form distinction is based on the durability of the imputation and its capacity for easy dissemination. As Justice Cardozo noted in Ostrowe v.

Lee,

> Many things that are defamatory may be said with impunity through the medium of speech. Not so, however, when speech is caught upon the wing and transmitted into print. What gives the sting to the writing is its permanence of form. The spoken word dissolves, but the written one abides and perpetuates the scandal.(86)

Several legal theorists have contended that the enormous potential harm of imputations made on radio and television may provide an impression in the mind of an audience member as permanent as that gained from a printed page and in no way lessened by a lack of durability.(87)

Application to Radio and Television

While theorists were establishing the various legal tests, the radio and television industries created problems for courts(88) to adapt these distinctions to the media. Direct application of either the sight and sound or the permanency criteria is futile. Radio can reach an audience of millions with a defamatory remark through words conveyed by a single voice, and this voice may or may not be embodied in a permanent form.(89) For example, three types of programs may include defamation: (1) a program from a script; (2) a program from a script where a performer interjects an extemporaneous defamatory remark; and (3) a spontaneous "live" program such as an interview whereby defamation is uttered extemporaneously.(90) In addition, each of these may or may not be recorded. There is a difference between a spontaneous defamatory remark

on a "live" broadcast and the same remark recorded and broadcasted later. As could be expected, decisions have not been consistent.(91)

Program from a Script

Defamatory remarks read from a script have in most cases been considered as libel by the courts. Hartman v. Winchell(92) held such defamatory utterances to be libel on the basis of "permanence of form," rejecting the argument that the audience did not know the words were being read from a script. In the concurring opinion for this case Judge Fuld attempted to open the door for a broader base:

> If the base of liability for defamation is to be broadened in the case of radio broadcasting, justification should be sought . . . in a frank recognition that sound policy requires such a result . . . That defamation by radio in the absence of 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 common-law action for defamation and since it is reasonable to preserve 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 to the conclusion that defamation by radio should be actionable per se.(93)

Although television defamation should have logically developed this broader base by analogy to motion pictures,(94) such was not the case. In Remington v. Bentley the court rejected application of motion picture standards and refused to categorize such defamation as libel:

> I feel that the additional factor of pictorial representation along with the statements adds no more to the form of defamation than would the circumstance of a great audience in a stadium or the like listening to the spoken word. I adopt this view keeping in mind and in spite of the fact that defamation in motion pictures has been treated as libel.(95)

The court in Landou v. Columbia Broadcasting System, Inc.(96) took a contrary view; however, its decision was based upon defamatory remarks from a prepared script.

Extemporaneous Remark

Defamatory remarks delivered extemporaneously provided difficulty for the courts, not only in terms of conflicting decisions, but in justification for their application of the distinctions. Many courts held extemporaneous remarks broadcast by radio to be slander based upon a lack of "permanence of form."(97) In Irwin v. Ashurst, however, the court concluded that such new media could be used as

> . . . a most powerful agency for the defamation of character . . . [A]ssume that a person writes a speech of a defamatory nature and, after committing the same to memory, speaks over the air without referring to his manuscript. Would such be held slander and not libel? The person who hears the defamatory material over the air ordinarily does not know whether or not the speaker is reading from a manuscript. Furthermore, what difference does it make to such a person, so far as the effect is concerned?(98)

The initial view of the courts regarding televised extemporaneous remarks followed the precedent set by the radio cases and found such defamation to be slander.(99) This view prevailed until Shor v. Billingsley(100) rejected

the logic of the earlier cases. In this case the plaintiff brought an action for defamation based upon remarks made by Sherman Billingsley, operator of the Stork restaurant, on his nationally televised "Stork Club Show" in which he said of his competitor Toots Shor, operator of the Toots Shor Restaurant: "I wish I had as much money as he owes." Justice Hecht of the Supreme Court of New York held that this defamatory broadcast should be treated as libel rather than slander, even though it was not read from a script. Justice Hecht based his reasoning upon the capacity for harm doctrine rather than "permanence of form."

Basis of Liability

The confusion is further complicated by the conflict between those who believe that defamation by broadcast should incur the same liabilities as the press (strict liability)[101] and those who think it should be favored by the law (due care negligence).[102]

Strict Liability. Sorenson v. Wood held a radio station liable for defamatory remarks read from a manuscript, stating simply, "The underlying basis for liability is libel, and not negligent conduct."[103] In a contrasting decision the Supreme Court of Pennsylvania in Summit Hotel Co. v. National Broadcasting Co.[104] held that the law of defamation in that state requires only that a broadcaster exercise a high standard of care, with no imposition of liability without fault. These two cases

exemplify the underlying question which the courts have been unable to resolve: Should the traditional law of defamation (strict liability) or the law of negligence be the basis of liability for broadcast defamation cases? Newspaper publishers are subjected to strict liability and many legal theorists would apply the same extent of liability to broadcasters.(105)

The analogy between newspaper publishers and broadcasters was further intertwined in Coffey v. Midland Broadcasting Co.:

> The (newspaper) prints the libel on paper and broadcasts it to the reading world. The owner of the radio station "prints" the libel on a different medium just as widely or even more widely "read."(106)

The court argued that a broadcaster should assume the same liability for defamation outside of its control as a newspaper publisher assumes from defamation slipping by proofreaders. A multitude of writers have supported strict liability for broadcasters based on similar lines of reasoning.(107)

Negligence. Alarmed by potential imposition of strict liability, the National Association of Radio and Television Broadcasters (NARTB), now known as the National Association of Broadcasters (NAB), urged state legislators to create laws establishing lack of due care as the basis for liability.(108) N.A.B. distributed a model statute to encourage adoption of statutes favorable to its professional members.

Section 1 of the model statute provided for no liability

> . . . unless it shall be alledged 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.

Section 2 relieved the broadcaster from liability "for any defamatory statement uttered over the facilities of such station or network of stations by or on behalf of any candidate for public office." Section 3 allowed the plaintiff to collect "only such actual damages as he has alledged and proved."(109)

State legislators reacted favorably to N.A.B.'s suggestions with the result that at least twenty-four states adopted statues paralleling section 1;(110) twenty-three followed the model in regard to section 2;(111) and four states enacted section 3.(112) Still other states have somewhat modified variations of particular sections.(113) In addition, seven states have enacted statutes which permit defamatory statements to be retracted.(114)

Reasons for Concern

There are several reasons for concern with the present state of broadcast defamation laws: (1) The laws of broadcast defamation vary from state to state contributing to conflict of laws. (2) The slander-libel distinctions as applied to radio and television result in grave inequities and impractical adaptations. (3) Arbitrary lines drawn between actionable and non-actionable words destroy

the balance between free speech and the rights of the individual traduced. (4) Present standards of liability for broadcast defamation are unacceptable. (5) Media injuries to personality are placed in a very low level category of consideration. (6) The law neglects consideration of potentially harmful aspects of radio and televised communications. Each of the reasons for concern cites a major inadequacy inherent in our present laws. These inadequacies should be curbed, and where possible, eliminated.

Conflict of Laws

The laws of defamation vary between states, but broadcasts cross state lines. State boundaries are no barrier to a broadcast. A court may hold that the final act of your broadcast occurred in a receiving set a thousand miles away, rather than in the studio.(115) Because of the conflict of laws, various legal consequences may result from multi-state broadcast defamation.

It can be seen that no semblance of uniformity can be found in the various approaches which the courts have devised in attempting to solve the choice of law problems inherent in multi-state defamation situations. The substantive defamation laws vary greatly from state to state and seem always to be changing.(116)

Inappropriate Distinctions

The slander-libel distinctions as applied to radio

and television result in grave inequities and impractical adaptations. A clear inequity exists in the law when it may be actionable for a defendant to write that a plaintiff is a "damned liar" on a post card,(117) which is read by a single person, but it may not be actionable if the same statement is uttered extemporaneously over television to a million viewers. For the lesser of the two evils, publication by a third person reading a post card, to receive the brunt of the law of libel appears inequitable and unjustified. At the same time, for the obviously more serious matter to be placed in a less serious slander category appears even more disheartening, especially if that category is slander per quod requiring the plaintiff to prove actual damages.

In their effort to arrive at just decisions and avoid inequities, the courts have experienced difficulty. Many courts have based their decisions not on the facts of the case or the gravity of harm, but on legal precedents, state statutes, and federal law; thereby upholding the slander-libel distinctions, which may or may not produce a just result in a particular case. Not all courts, however, have been blindly led down the "tunnels of distinction"(118) for several courts have considered broadcast defamation as neither slander or libel,(119) some courts have reversed precedent for a more equitable result,(120) and still others have avoided the issue through various means.(121)

Actionable and Non-actionable Words

Arbitrary lines drawn between actionable and non-actionable words destroy the balance between free speech and the rights of an individual traduced. The law holds that certain words are defamatory while others are not, thereby encouraging the development of distinctions and categories. These distinctions and categories destroy the needed balance between free expression and the right to be free from defamatory imputations. As Judge I. Skelly Wright stated in the Texas Law Review,

> In drawing a line between permissible and impermissible speech, some permissible speech will be restricted. The speaker, lest he cross over the line through momentary misjudgment, will tend to keep a safe distance from the dividing mark, and where the line is not, and cannot be, clearly drawn, the speaker will be even more cautious. One steers clear of a barbed wire fence, but he stays even farther away if he is not sure exactly where the fence is.(122)

Hence, the law might do better to delay judgment of whether a word is defamatory or not for determination in each case.

Standards of Liability

Present standards of liability for broadcast defamation are unacceptable. Strict liability places an undue burden upon the broadcasters. The negligence standard disregards hardships suffered by the plaintiff. The "permanence of form" test fails to comprehend the effects of the defamation, considering rather the permanence of its form, while the "capacity for harm" test looks adversely upon broadcasting simply because of its power when in fact an in-

dividual may not have been harmed.

Strict Liability. Jurisdictions which follow the strict liability theory subject their broadcasters to an unnecessary degree of control. Broadcasters cannot be expected to control their dissemination of information to the point where defamatory remarks will not occur, lest valuable information may be lost through too close scrutiny. In addition, as a practical matter a broadcaster is not always in a position to know what is going to be said, nor is it usually possible for the broadcaster to "close off a broadcast when it appears that defamatory matter is being published."(123) Thus, jurisdictions which follow the strict liability standard--drawing analogies to newspaper publications--restrict the free dissemination of information and place broadcasters in an untenable position.

Negligence. The due care negligence standard shifts the basis of liability too far in the other direction, disregarding possible hardships suffered by the plaintiff. As George I. Van Os noted in the Houston Law Review:

> It is entirely possible that a defamation be broadcast without any negligence attaching to the operators or broadcasters, and the defamatory statement, benefit the station through increased audience appeal or product appeal. The plaintiff would suffer injury to his reputation but would be unable to be remunerated due to the broadcaster's lack of negligence.(124)

Thus, in this hypothetical example, not only did the plaintiff suffer a hardship for which he will not be appro-

priately remunerated, but the defendant actually benefited from the defamation. To allow this result suggests that justice submit itself to media power.

Permanence of Form. As a further consideration, the application of the "permanence of form" and the "capacity for harm" standards fails to provide a sound basis for liability. The "permanence of form" standard argues that defamatory material read from a script should be considered as libel. This criterion completely disregards the effect of the broadcast and bases liability upon material of a permanent nature. An audience may not know nor care that material is being read from a script and the capacity for harm will certainly not increase because the material was read from a script as opposed to being expressed extemporaneously.

Capacity for Harm. Although the "capacity for harm" should be considered for the purpose of formulating theories, it should not be a theory of liability in itself. Liability should be based upon an actual harm in a particular case based upon some proof of damage rather than an imputation of harm based on the capacity of a given media to produce such harm.

Media Injuries to Personality

Media injuries to personality are placed in a very low level category of consideration. As one writer noted,

"the Washington Post, Station WCBS-TV, and Time magazine represent clusters of power quite as awesome as the Defense Department, American Telephone and Telegraph, and General Motors."(125) It cannot be denied that the function of the courts should be to assure that victims of defamatory imputations receive just compensation from the "media powers." The degree of concern for the individual traduced should be increased from the point of view of the courts to encourage "the maximum dissemination of information" while " . . . helping to protect those injured by over-zealous communication."(126)

Relevant Distinctions. The "real" distinctions should establish differences between entertainment and news, injury and non-injury, fault and lack of fault. In regard to the distinction between entertainment and news, Marshal S. Sharpo, associate professor of law at the University of Texas, contends that

> When a medium creates idle curiosity simply to satisfy it; when it advertises entities not pressed by the exigencies of the moment merely to get customers to buy or to view, then the very confusion of "entertainment" with "news" would imply that the entrepeneurial nature of the medium must be taken into consideration in formulating legal standards governing injury to personality.(127)

Thus, it is readily apparent that in the case of defamation occuring through entertainment as opposed to "hard" news, a broadcaster should logically be required to compensate the defamed individual.

A further distinction might be drawn between injury and non-injury. For example, it is conceivable that one individual may be severely harmed by a particular word or statement, whereas another individual may not be affected by that identical word or statement. For this reason liability should not be based upon the "manner in which the defamatory statement is communicated"(128) or some other irrational distinction; but rather, the basis of liability should be the actual harm done to the individual. The courts should, therefore, give more consideration to matters such as "the plaintiff lost every friend he had" and less to "the defendant read the imputation from a script."

In some cases a distinction between fault or lack of fault may be needed to determine negligence (or lack of negligence) on the part of the defendant. Such a distinction would be more acceptable than an arbitrary one between slander and libel or their legal derivations.

Neglected Aspects of the Law

The law neglects consideration of potentially harmful aspects of radio and televised communications: (1) Differences in appeal by the various media are not usually considered by the courts. (2) Televised non-verbal communications may be defamatory. (3) Technical manipulations by radio and television stations may cause or contribute to defamation.

Differences in the Various Media. In regard to the different properties and appeals of different media, Harvey J. Levin, author of Broadcast Regulation and Joint Ownership of Media, noted that

> These media have diverse appeals--to eye (in words and pictures), to ear (in words and sound effects), and to eye and ear combined. Other differences can be defined in terms of the degree to which a medium is space-organized (newspapers), time-organized (radio), or time-and-space organized (movies and television). Still other differences exist in the degree to which any medium facilitates social participation (movies ranking first and newspapers last); a medium's speed (radio and television first and movies last); and its permanence (movies ranking first, newspapers next, and radio and television last).(129)

These different properties and appeals, especially regarding radio and television, have been rarely considered by the courts.

Non-verbal Communications. The problem is especially acute with regard to non-verbal communication (the study of kinesics, proxemics, and paralinguistics) which may be as defamatory as any verbal utterance. Scholars of kinesics, the study of bodily movement and its resultant meaning, believe that words express at most only thirty-five per cent of what people wish to convey.(130) An authority on kinesics, Ray L. Birdwhistell, observes: "Man is a multi-sensorial being. Occasionaly, he verbalizes."(131) Prox-emics (the study of social distance and spatial relation-ships), paralinguistics (the study of vocal variations), and kinesics permit the communication of meanings which may

be defamatory in themselves or may simply contribute or distract from a verbal imputation. Thus, raised eyebrows, rolling eyes, obscene gestures, cringing, unreasonable distances between people, and vocal intonations may all be contributing factors to a defamatory imputation over television, and in a rare instance could be defamatory without words. The courts should therefore provide compensation for individuals harmed by televised, defamatory non-verbal communications.

Technical Manipulations. Through manipulated camera shots, color tones, and program arrangements, broadcasters can damage an individual's reputation either intentionally or non-intentionally. A simple matter such as varying

> the focal length of the lens used and the subject-to-camera distance . . . (may produce) changes in perspective. In the 9 mm shot, the nose is elongated and the ears seem to be far back. The 100 mm shot gives us a flatter perspective than the 17 mm shot. In the 100 shot, the ears appear to be much closer to the front of the face, and the chin seems smaller.(132)

Color tones may also be manipulated to achieve various effects:

> That there is an emotional content associated with color becomes obvious when we think of such terms as "warm beige," sickening yellow," and "shocking pink."(133)
>
> . . . language, by itself, can only express an experienced emotion while the visual may provide the emotion itself.(134)

Even the arrangement of materials within programs, as well as materials preceding and following a given program, may

contribute to, and possibly cause defamatory imputations.

Approach to Reform of the Law

Based upon the growing concern for reform of broadcast defamation laws, several theorists have called for the creation of a new tort. Speculation in this regard culminated in 1962 when a Georgia Appellate Court in American Broadcasting-Paramount Theatres, Inc. v. Simpson[135] held that defamation by radio and television falls into a new category--defamacast--and is actionable per se. In this case the plaintiff, one of two federal prison guards who accompanied Alphonce Capone from Atlanta Federal Prison to Alcatraz Federal Prison in 1934, brought an action against the producer of a television show, "The Untouchables." The program showed one of the guards accepting a bribe from Capone, an event which plaintiff contended was false. In holding that defamation by radio and television falls into a new category, the court reasoned that common law must be revamped to avoid usage of the slander-libel dichotomy.

In regard to this dichotomy, the court noted that

> . . . whatever the rationale, we think the distinction bears very little relationship to the realities of the problem. After all, the listener or viewer cares little and often does not know whether a script is being used. Nor does the use of a script have any relationship to the broadcasters ability to harm.[136]

It therefore appears that the court believed that the slander-libel distinction has outlived its usefulness regarding the realities of the problems involved in broadcast defama-

tion. The court further contended that the law must change to adapt to the needs of our times.(137)

> The novelty of the complaint is no objection when an injury recognized by the law is shown to have been inflicted on the plaintiff. In such case, although there be no precedent, the common law will judge according to the law of nature and the public good.(138)

It is interesting to note that the court did not feel compelled to wait for legislation on the matter, as it said,

> Some courts have held that the relief here sought can be granted only by legislation, and that in the absence of such legislation that courts are without power to grant it. Ursurpation of the legislation by the courts is never justified, and will not be tolerated. But, this fundamental principle is not upheld by refusal of the judiciary to discharge to the limit of its authority the functions imposed upon it by the Constitution, upon the excuse further legislation is necessary.

Hence, this court provided the impetus for development of a new tort.

Although there are means of remodeling the law short of developing a new tort, this writer will extract principles of law which should be included in the formulation of a new tort. The writer will seek to indicate common variables, dimensions and lower level concepts, needed for construction of the new tort. The theoretical construction of the new tort, termed defamacast for the purpose of this thesis, will offer information, analysis, and theory common to several approaches for reform of law.

CHAPTER II

BROADCAST DEFAMATION

EXPLICATION OF APPLICABLE LEGAL PRINCIPLES

General Background

The clearest historical analogy where a written analysis influenced the construction of a new tort occured when Samuel D. Warren and Louis D. Brandeis recognized a "right of privacy" in a famous 1890 Harvard Law Review article.(140) This right, and the accompanying new tort, now exist in at least thirty-four states.(141) In the same manner, several legal writers(142) have already called for a new tort to cover actions for broadcast defamation. It seems to follow, then, that an effort should be made to extract applicable rules and privileges from the present law of defamation and apply them toward construction of a new tort. Explication of legal principles concerning multi-state defamation, standards of liability, determination of damages, and defenses against charges of defamation will provide a basis for construction of this new tort.

Multi-state Defamation

When a defamatory utterance is made over radio and television in one state, it will invariably reach a multitude of eyes and ears in other states. This multi-state

defamation causes conflict of law problems for the courts to settle and for victims whose right to compensation fluctuates "in a haphazard and arbitrary fashion according to the particular position which each state of impact has taken on the scope and extent of broadcaster liability."(143)

Conflict of Laws

Common law provided that every communication of a libelous statement constituted a separate cause of action.(144) Since it would not be feasible to allow separate causes of action in broadcast defamation cases, for there could be millions of actions against one defendant, the courts have suggested three possible alternatives: lex loci delecti (the law of the place where a tort is committed),(145) the contacts approach (determining which state provided the most contributing variables),(146) and the single publications rule (each publication gives rise to one cause of action).(147)

Lex Loci Delecti. In Hartman v. Time, Inc.,(148) a plaintiff alleged that he had been libelled in forty-eight states in an issue of Time magazine. The court held that the single publications rule could not cross state lines and applied a multiple publications choice of law rule in those states which retained that doctrine. This interpretation placed a tremendous strain on the jury to apply the laws of forty-nine jurisdictions (with the District of Columbia)

to this single multi-state defamation. Thus, although the lex loci delecti has been a standard conflicts approach with regard to most interstate tort situations,(149) it certainly is undesirable for broadcast defamation cases where there might be fifty-one places of simultaneous impact.

Contacts Approach. In Dale System, Inc. v. General Teleradio,(150) the court listed five "dominant contacts": the forum, the place of last event, the point of origination, the state of principal circulation, and the plaintiff's domicile. The court held that three of the five contacts were found in New York and therefore applied New York law. In Kemart Corp. v. Printing Research Laboratories, Inc.,(151) the court held that two "dominant contacts" were in California and applied California law. In most situations this approach is superior to lex loci delecti for it recognizes the applicable variables and attempts to work with them.(152) It remains unsatisfactory, however, in that it does not engender uniformity or predictability, nor can it consider the vast array of variables applicable to radio and television.(153)

Single Publication Rule. In cases involving venue or or the statute of limitations, the majority of American courts have adopted the "single publication rule" which treats a defamatory broadcast as one publication whereby the plaintiff is permitted to plead and prove a general dis-

tribution of the libel as evidence of damage.(154) The Commissioners of Uniform State Laws have adopted this rule in the Uniform Single Publications Act which six states have enacted.(155) Section 1 of this act provides that

> No person shall have more than one cause of action for damages for libel or slander . . . of a broadcast over radio or television. Recovery in any such action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

Section 2 provides that

> A judgement in any jurisdiction for or against the plaintiff upon the substantive merits of any action for damages founded upon a single publication or exhibition or utterance described in Section 1 shall bar any other action for damages by the same plaintiff against the same defendant founded upon the same publication or exhibition or utterance.

If the "single publication rule" were followed in all states, the choice and conflict of law problems would be greatly diminished.

Federal Law

Our national scheme of radio and television publication requires a federal law of broadcast defamation. A federal law would have three potential advantages over our present conglomeration of state laws. First, the law could produce uniformity among the states providing "some degree of certainty to both the publisher and his libel victim."(156) Second, a national law could "establish ground rules" and provide a "simplified procedural framework for their enforcement."(157) Third, a federal law could abolish the confused

mass of inappropriate distinctions in the present law.(158)

This approach would be justified by three separate constitutional provisions,(159) by the national character of broadcast defamation, and by the practical adaptations of such a law. In this manner Congress could create a federal cause of action leaving the actual responsibility of molding a federal common law to the courts; or even better, Congress could develop rules and privileges to be applied by the courts.

Basis of Liability

Whether a broadcaster should be considered as a publisher or a disseminator, has not been resolved by the courts. For this reason the courts are still troubled by two theories of liability: strict liability in the case of a publisher and due care negligence in the case of a disseminator.

Broadcaster as Publisher

It has been established that in order for defamation to occur, there must be "publication,"(160) which means that the defamatory imputation must be communicated to someone other than the defamed. Publication may be oral, written, or even conveyed by gestures or the exhibition of a picture or statue.(161) Every repetition of the defamation is a publication in itself;(162) and usually, every one who takes part in the defamation is charged with publication.(163) There may even be an affirmative duty to

remove a publication made by another.(164) The publisher of defamation, whether libel(165) or slander,(166) is strictly liable regardless of whether he originated it. The majority of jurisdictions lean toward holding broadcasters accountable as publishers.(167)

Broadcaster as Disseminator

A "disseminator," on the other hand, merely circulates defamatory materials already communicated to another.(168) The proprietor of a bookstore or newspaper stand distributes or disseminates books and periodicals. In a close analogy to the bookstore, the broadcaster distributes and disseminates information, which is often out of his immediate control and may not be detected. As Professor Francis Bohlen stated in the Harvard Law Review, it

> would seem that justice would be done and the good reputation of all mankind given sufficient protection by treating the broadcaster as a disseminator rather than publisher of the defamatory interpolation.(169)

Professor Bohlen suggested that the broadcaster should be liable only if he fails to exercise care to insure "that no scandalmonger should take advantage of its facilities to speak over its microphone matter defamatory of other persons."(170) The American Law Institute's Restatement of Torts adds that a broadcaster is "at least liable" for dissemination of defamation where he fails to exercise due care to prevent publication.(171)

American Law Institute's Restatement

In their quest to restate the law of defamation applicable to radio and television, the American Law Institute recognized three approaches: (1) to prescribe liability equal to that of a newspaper and periodical publisher or strict liability; (2) to establish a duty of care for broadcasters, breach of which would establish liability; and (3) to treat the matter as caveat without a positive pronouncement on it. The Institute voted seventeen to fourteen to treat the matter as caveat with the following comment appearing in their Restatement:

> A libel may be published by broadcasting over the air by means of the radio, if the speaker reads from a prepared manuscript or speaks from written or printed notes or memoranda. Whether an extemporaneous broadcast is a libel or a slander depends on factors stated in subsection (3).(172)

Subsection 3 calls for consideration of the geographic area in which dissemination occurs, the deliberation and premeditation of the publication, and the persistence of the defamatory conduct.(173)

Strict Liability

Strict liability evolved from the English courts where the defendant was held liable without regard to whether he was negligent,(174) whether he intended to harm the plaintiff(175) or whether he might in fact have intended to praise the plaintiff.(176) The only limitation placed upon liability required the defamatory meaning to be "reasonably conveyed to and understood by others"(177) as referring to

the plaintiff and harming the plaintiff.

Those favoring application of strict liability to broadcasters argue that the active participation of the broadcaster is necessary for publication of defamation; that the law of defamation imposes the risk of publication upon the publisher rather than the victim; and that owners of radio and television stations enter such a business with the awareness of certain risks.(178) Strict liability would impose joint liability upon the broadcaster and the speaker in their capacity as publishers and would "abolish any distinction between defamation from a script and defamation by an extemporaneous remark."(179) These theorists contend that a station would protect itself by taking proper corrective measures.(180) What some theorists fear, however, is that "victims" of harmless remarks would create a "flood of litigation" thereby congesting the courts with trivial matters; and that information, analysis, political viewpoints, and entertainment would be curtailed by broadcasters to avoid liability.(181)

Negligence

Proponents of the negligence basis note that negligence would provide the courts with a familiar standard of required conduct for the defendant; that the plaintiff would be required to prove actual damages; and that the burden of proof would be on the plaintiff and the defendant could present whatever defenses might exist.(182) These theorists

further reason that since a broadcast is subject to very little control, the laws of negligence would provide the only equitable result. The principle objection to this approach arises where the plaintiff suffers an unwarranted hardship and the broadcaster was not in any way negligent, yet the station accrues a benefit through increased audience or product appeal.(183)

Search to Balance Interests

Neither the strict liability approach nor the negligence standard balance the interests between the rights of defamed individuals as contrasted with the rights of society to be informed and the rights of broadcasters to exercise free speech. Absolute liability places an unwarranted burden upon the defendant (broadcaster) and could even stifle the flow of information in a free society. The negligence requirement tips the balance in the other direction by requiring the plaintiff to fulfill the almost impossible task of proving negligence.(184) Hence, the courts need a new basis of liability to balance these interests and provide a workable method of deciding broadcast defamation cases.

Res Ipsa Loquitor

A 1964 Houston Law Review article suggests application of the doctrine of res ipsa loquitor to balance the interests.(185) The doctrine of res ipsa loquitor would require the plaintiff to prove three conditions which must be

present in a defamatory broadcast for the broadcaster to be held liable. These conditions, as they have been established in the law of negligence, require that: "(1) the damage must be of a kind that does not ordinarily occur in the absence of negligence; (2) it must be caused by an instrumentality within the exclusive control of the defendant; and (3) it must not be due to any voluntary act on the part of the plaintiff."(186) The article explains that this doctrine would provide for an equal balance of interests:

> The plaintiff, to establish the inference of negligence, must prove that the three conditions are present. The defendant would have the opportunity to rebut the inference of negligence. The plaintiff would have difficulty proving the actual operations of a radio or television station, whereas this would not present a problem to the defendant. Each party would be required to prove up certain elements, but neither party would be hindered by an unjust burden of proof.(187)

Thus, the res ipsa loquitor doctrine would provide an equitable and workable basis of liability from which both the plaintiff and defendant could present arguments germane to a particular case. With this basis of liability, the defendant would have to prove a lack of negligence and the plaintiff would have to counter with proof that the defendant has received a benefit. The jury would be free to make equitable compensations in particular cases.

Determination of Damages

When a defendant is found liable, damages flow as a natural result. These damages are a "pecuniary compensation

or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through an unlawful act or omission or negligence of another."(188) Types of damages, statutes regulating damages, mitigation of damages, and theories of compensation should be considered with their application to broadcast defamation.

Types of Damages

Black's Law Dictionary defines thirty-four different types of damages.(189) The three most common divisions of damage applicable to broadcast defamation are general, special, and exemplary damages. General damages are awarded for "loss of reputation, shame, mortification and hurt feelings,"(190) and are implied or presumed "to have accrued from the wrong complained of . . . without reference to the special character, condition, or circumstances of the plaintiff.(191) Special damages are those which the plaintiff alleges and proves for his actual and real loss or injury.(192) Exemplary damages are awarded to the plaintiff as a means of punishing the defendant for actual malice.(193)

General Damages. General damages are awarded to the plaintiff with the presumption that a defamatory imputation would cause a harm to the plaintiff's reputation, implied in the law without actual proof of harm in a particular case. Imputations which are held slanderous per se or

libelous per se presume that damage has resulted.

Special Damages. Special damages require proof of actual harm to the plaintiff's reputation. In order to collect special damages, the plaintiff must allege and prove that a certain defamatory imputation caused a harm to his reputation. Imputations which are held to be slanderous per quod, and in some cases libelous per quod, require proof of actual damage.

Exemplary Damages. Exemplary damages are awarded upon proof of actual malice on the part of a defendant.(194) This malice will not be presumed from the broadcast, but must be proved by the plaintiff. Exemplary damages punish the defendant for his malicious behavior thereby making an example of him. Exemplary damages are sometimes referred to as punitive or vindictive damages.

Statutes Regulating Damages

There is no set rule for awarding damages as each jurisdiction has its own peculiar adaptations. The National Association of Broadcaster's model statute advocates the use of only special damages requiring the plaintiff to allege and prove damages in each case. The majority of jurisdictions, however, allow general or exemplary damages or both to be recovered in certain instances. In addition, some states punish broadcast defamation criminally, and others have enacted retraction statutes which may be used to

mitigate damages.

N.A.B. Model Statute

Section 3 of the National Association of Broadcaster's model statute provides that "the complaining party shall be allowed only such actual damages as he has alleged and proved."(195) Arizona,(196) Nebraska,(197) and Wyoming(198) have adopted the provision verbatim, while Georgia's statute(199) provides that the complaining party shall be allowed only "actual consequences, or punitive" damages which have been alleged and proved. Louisiana,(200) Oregon,(201) and Maryland(202) provide recovery of damages for actual injury suffered, although their statutes are worded somewhat differently.

The Majority Rule. Legislation requiring proof of damage in libel has been enacted in at least sixteen states;(203) however, the majority of jurisdictions appear to follow the common law rule that certain imputations are actionable per se without proof of damage. In situations where the imputation was not actionable per se, these courts hold that damages must be alleged and proved.

Criminal Punishment. Thirty-three states have some form of criminal punishment for broadcast defamation.(204) This punishment varies from California's statute(205) providing for "a fine not exceeding five thousand dollars, or imprisonment in the county jail not exceeding one year, or

by both such fine and imprisonment" to a more lenient North Dakota statute which calls for "a fine of not more than one thousand dollars."(206) Thus, in the majority of states a broadcaster may be subjected to both criminal and civil liability.

Retraction Statutes. Ten states have retraction statutes whereby a defendant may retract statements made in a defamatory broadcast.(207) These statutes usually provide that only actual damage may be recovered if a retraction is published and there is no malice on the part of the defendant.

Mitigation of Damages

Damages may be reduced or mitigated by "facts which show that the plaintiff's conceded cause of action does not entitle him to so large an amount as the showing on his side would otherwise justify the jury in allowing him."(208) It might therefore be argued that damages should be mitigated through retraction statements, through the plaintiff's exercise of his right of reply, and by proof that certain statements were true.

Retraction Statements. Under common law, a retraction made immediately after the defamation served to exonerate the defendant, provided that the defamatory imputations did not have time to make an impression and be spread further. Retractions have three additional functions:(209) to show

that the plaintiff has suffered less than he claims with regard to actual damages,(210) to reduce or negate the "malice" or outrageous conduct which form the basis for exemplary damages,(211) and to provide evidence of the defendant's good motives and intentions in exercising a privilege.(212) A refusal to retract when a request has been made may be evidence of malevolence or improper purpose on the part of a defendant.(213) A retraction must be full and unequivocal(214) with reference to the original publication(215) and must be more than a mere offer to publish any statement which the plaintiff cares to make.(216)

Right of Reply. In 1822 France enacted press legislation which provided a right of reply under which a plaintiff may publish his own version of a matter with the use of a defendant's (newspaper) facilities.(217) This French right influenced the enactment of similar legislation in most European and South American countries.(218) The French law permits a reply to expressions of opinion as well as fact and allows the person replying to express his own point of view. This right is also provided in Nevada's(219) general reply statute and the right has been granted to political candidates in Mississippi.(220) In addition, Section 315 of the Federal Communications Act of 1934 provides a limited right of reply over radio and television. Section 315 requires a station which permits one legally qualified candidate to use its facilities to afford

equal opportunities to all other candidates for that office.

Richard C. Donnelly contends in a 1948 Virginia Law Review article that it should be possible

> for a person who feels aggrieved by a statement . . . to avenge his reputation without having to resort to the sordid procedure of a law suit to recover damages; to provide him with a form of relief more appropriate to the type of harm sustained. Second, is to make newspapers and other media of mass communications serve as better instrumentalities for the dissemination of conflicting and divergent points of view . . . freedom is more than freedom from; it should be freedom for . . .(221)

In cases where a broadcaster did not believe the statement to be defamatory, Donnelly suggests that a defendant (broadcaster) should be given a choice to retract an allegedly defamatory statement or offer the defamed individual a chance to reply to the statement. With this innovation in the law, either a defendant's retraction or a plaintiff's reply could be used to mitigate damages and in some cases completely exonerate a broadcaster from liability.

Truth. In the present law, truth is a complete defense from liability. This defense exists despite the fact that a defendant may have published remarks for morally indefensible and malevolent reasons.(222) Certainly, a defendant should be required to have a purpose in harming someone's reputation, regardless of the truthfulness of his imputations. For this reason, there is significant support for "dropping" truth as a complete defense and reserving

its use for the mitigation of damages.(223)

Theories of Compensation

There appear to be three theories of compensation: monetary reimbursement, monetary benefit, and restoration of the plaintiff's reputation. The theories differ in their requirements for the proof of damage, their concern for the reputation of a plaintiff, and their effect upon the free flow of information in a free society.

Monetary Reimbursement Theory. The theory of monetary reimbursement would require the plaintiff to prove special damages, as in slander per quod and libel per quod cases. Although there may be times when a plaintiff is harmed without a clear ability to prove damages, the theory rests upon the belief that a defendant should compensate a plaintiff for only actual damages. Hence, this theory is weighted heavily in favor of the defendant and provides little opportunity for the plaintiff to restore his reputation.

Monetary Benefit Theory. The monetary benefit theory would not require the plaintiff to prove damages, but rather would award them on the basis of the defamatory nature of certain imputations or proof of actual malice. General damages would be awarded in slander per se and libel per se cases. Exemplary damages would be awarded for proof of actual malice on the part of the defendant. This theory

of awarding damages without proof of harm raises two problems: (1) the free flow of information in a free society may be stifled and restrained; and (2) certain imputations are not indefinitely actionable. An English writer expresses concern for the first problem, in stating

> There is danger in this hypersensitiveness, for not only does it produce quite unmerited windfalls for the lucky litigants, but also it may tend to check and restrain the press in the exercise of its duty of making legitimate criticism and comment.(224)

Judge Fuld in Mencher v. Chesley discussed the second area of concern:

> Whether language has that tendency (being actionable without proof of special damage) depends, among other factors, upon the temper of the times, the current of contemporary public opinion, with the result that words, harmless in one age, in one community, may be highly damaging to reputation at another time or in a different place.(225)

Restoration of the Plaintiff's Reputation. Restoration of the plaintiff's reputation could be partially accomplished through a statement of reply or retraction. In cases where this reply or retraction would be inadequate for the harm suffered by the plaintiff, a law suit in which actual damages would be proved and public awareness would be evoked could further repair the plaintiff's reputation. Thus, the emphasis would be upon restoration of the plaintiff's reputation, rather than strict reimbursement or benefit. Although this theory is not presently applied to the law of broadcast defamation,(226) it appears to provide

maximum freedom of speech with sufficient protection of an individual's interest in his reputation.

Defenses Against Charges of Defamation

A defendant may be exonerated from liability by establishing the defense of an absolute privilege, a qualified privilege, or truth. An absolute privilege protects a speaker or publisher, without reference to his motives or the truth or falsity of a statement, for statements made in judicial proceedings, in legislative proceedings, in executive communications, with the consent of the plaintiff, between husband and wife, and in political broadcasts under section 315.(227) A qualified privilege protects the defendant, unless actual malice and knowledge of the falsity of the statement is shown, for communication in the interest of the publisher, in the interest of a close associate, in the interest of a business function, with one who may act in the public interest, in the interest of public concern and fair comment, or in the public's interest to be informed through reports of public proceedings.(228) In addition, most jurisdictions have held that truth is a complete defense regardless of the defendant's motives.

Absolute Privilege

An absolute privilege completely protects a defendant from liability, regardless of his motives in publishing a statement or the truth or falsity of a statement. The

clearest instance where broadcasters are provided an absolute privilege occurs when political candidates speak under Section 315 of the Federal Communications Act. Although the privilege covers a small part of a broadcast day, the protection of the privilege in cases where it is applied is significant.

Judicial Proceedings. An absolute privilege extends to anything that may be said in relation to a matter at issue regarding any hearing before a tribunal which performs a judicial function. The immunity does not cover publications made before commencement or after termination of the official proceedings. It is also clear that statements given to the media concerning judicial proceedings are not absolutely privileged.(229)

Legislative Proceedings. Whatever is said in the course of legislative proceedings is absolutely privileged with regard to what the legislators might say. When these statements are republished outside of the legislature, the absolute privilege is lost.(230) In the case where legislative proceedings are recorded by radio and television, the broadcaster receives a qualified rather than an absolute privilege.(231)

Executive Communications. In the discharge of their duties, executive officers of the government, primarily on the national level, are privileged to communicate with ab-

solute immunity. This privilege is extended to press releases whereby officials may explain their actions to the public, including "all publications within the 'outer perimeter' of their 'line of duty.'"(232)

Consent of the Plaintiff. When the plaintiff consents to a publication, he cannot complain about later damages to his reputation.(233) This consent must be more than a request to speak,(234) an inquiry to what is meant, or consent to a different form or content of publication.(235)

Political Broadcasts. Section 315 of the Federal Communications Act provides that broadcasters shall afford equal opportunities to all political candidates, and that the station shall have no power of censorship. This has been interpreted to mean that a broadcaster may not refuse any legally qualified candidate if one is allowed to speak, nor may he exert any control over what is said.(236) Since publication in this regard is required by law, the broadcaster receives absolute immunity.

Qualified Privilege

A qualified privilege results when a publication is "firmly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned."(237) The immunity from liability is conditioned upon publication in a reasonable manner and for a proper

purpose.(238)

Fair Comment on Matters of Public Concern. Although the constitutional guarantee of free speech does not confer a privilege to publish defamatory materials merely because it has "news" value and the public would like to hear it,(239) the privilege does extend to matters which are of legitimate concern to the community.(240) This privilege relates to the discussion of the administration of public affairs,(241) the conduct or qualifications of public officers or candidates,(242) or employees,(243) the spending of public funds,(244) the management of institutions,(245) the affairs of private enterprise which affect the general interest of the community,(246) and anything submitted to the public for approval such as a book, sports event, or scientific discovery.(247)

For this reason broadcasters may provide comment upon matters of public concern with assurance that the constitutional guarantee of freedom of speech includes the qualified privilege of making controversial statements about individuals. The Supreme Court in New York Times Company v. Sullivan(248) extended this privilege to false statements of fact about individuals connected with all matters of public concern.(249) In these instances, as in all matters providing a qualified privilege, the communication is privileged unless actual malice or improper intent can be associated with the publisher.

Reports of Public Proceedings. It has been reasoned that a reporter is merely a substitute for the public eye and that public affairs should be made known to all.(250) By this reasoning, the reporting of legislative proceedings,(251) investigation of committees,(252) deliberations of municipal councils,(253) and official governmental reports and communications(254) may be conducted under the claim of privilege. This privilege does not extend to reports of a private group,(255) unless the meeting is open to the public, and what is said bears upon the public interest.(256) It has been held that reports of this nature, having a qualified privilege, must be substantially accurate and must state the source of what is being reported.(257)

Truth as a Defense

The old English rule held that "the greater the truth the greater the libel." Most American jurisdictions have now reversed this rule and hold that truth is a complete defense.(258) Ten states have statutory provisions requiring that the publication must be made with good motives and for justifiable ends.(259) In the majority of jurisdictions, however, it is "immaterial that the defendant published the facts for no good reason or for the worst possible motives, or even that he did not believe at the time that they were true."(260) This rule has been attacked on the grounds that "it affords immunity for morally inde-

fensible malevolence and needlessly kicking a man when he is down."(261) A more reasonable approach would consider truth as a qualified privilege.

CHAPTER III

DEFAMACAST AS A NEW TORT

IMPLICATION OF THEORETICAL DIMENSIONS

General Background

Although there has been disagreement as to the direction in which the law of broadcast defamation should move, the writer will theoretically revamp the entire law. Defamacast, defamation by broadcast, will be considered as a new tort with related lower level concepts. Conceptualization of this new tort will be accomplished through a suggested model statute at the federal level. This model statute will establish a federal cause of action; a sound basis of liability; general, special, and exemplary damages; provisions for retraction and reply statements; and modifications of our present absolute and qualified privileges. The proposed federal law will be advantageous: first, by eliminating most conflict of law problems; second, by removing the inappropriate distinctions from the law; third, by balancing the interests of the plaintiff and defendant; fourth, by curbing mass media injuries to personality; fifth, by allowing maximum free speech with sufficient protection for the individual; and sixth, by protecting the public from unfair manipulations

of media equipment. The dimensions of the new tort will be further explained through a hypothetical projection of possible litigation.

A Federal Model Statute

Construction of a model statute at the federal level would significantly change our present concepts of defamation by broadcast. Although the term defamacast is not specified in the model statute, the term could be used by the courts to refer to the distinct tort of defamation by radio and television. The proposed law follows.

Defamation by Radio and Television

Section 1 This act hereby establishes a federal law of broadcast defamation.

Section 2 Any victim of defamation emitted from the media of radio and television shall have a cause of action against any broadcaster engaged in disseminating such defamatory communications as well as any originator or publisher of the communication. The defamed party, whether an individual or a group of individuals, shall be required to prove that such imputations were of a defamatory nature as established in the laws of precedent or as indicated by the facts of a particular case; whereupon, a jury trial shall determine whether or not a disseminator or publisher is liable based upon the malice standard, negligence theory, or the res ipsa loquitor doctrine.

Section 3 Any dissemination or publication of defamatory materials, whether true or untrue, whether privileged or not privileged, whether creating an anticipated or an unanticipated effect, which is broadcast with a malicious or wrongful intent shall subject all persons or groups of persons with that intent to liability.

Section 4 A disseminator or publisher shall be liable for any act of negligence where a defendant breached a duty under the circumstance to exercise due care to prevent a defamatory broadcast.

Section 5 Any disseminator or publisher of defamation shall be liable when a presumption of negligence is established through application of the res ipsa loquitor doctrine, whereby (1) the damage in a particular case was of a kind that does not ordinarily occur in the absence of negligence, (2) the harm was caused by an instrumentality within the exclusive control of the defendant, and (3) the imputation was not due to any voluntary act on the part of the plaintiff.

Section 6 As compensation for loss to a plaintiff's reputation, a jury shall award either general damages which are implied in the law without proof of actual harm; special damages which require proof of actual harm to the plaintiff's reputation; exemplary damages which are awarded upon proof of actual malice or wrongful intent; or any combination of these damages. A plaintiff shall recover whatever damages are awarded from all defendants in a single trial and shall have no further cause of action for the original matter of litigation with the only remaining right being that of appeal to a higher court.

Section 7 A broadcaster shall make a reasonable effort to retract imputations which are untrue or accidentally broadcast or clearly defamatory where a complete and unequivocal retraction is agreed to by the defamed party or is designed to repair the injured party's reputation. A retraction broadcasted in this manner shall be considered in determination of liability and assessment of damages.

Section 8 Any individual or group defamed over radio or television shall have a right of reply to defamatory allegations whereby the public may be informed of the truth. This right may be denied by a broadcaster where he does not feel a reply is necessary or appropriate, whereupon the allegedly defamed individual may present his case to a local magistrate in an effort to receive a court order to enforce the right of reply. The local magistrate shall grant or deny the right of reply based upon the circumstances of the case. A reply broadcasted in this manner shall be considered in determination of liability and assessment of damages.

Section 9 There is no absolute privilege to broadcast defamatory imputations with the exception of a public official explaining his actions to the public, a plaintiff consenting to a publication, a political candidate speaking under Section 315 of the Federal Communications Act, or any other exceptions granted by Congress.

Section 10 A qualified privilege shall be extended to broadcasters to report the affairs of public proceedings, to make fair comment regarding matters of public concern, to broadcast truthful defamatory imputations, and to manipulate media equipment in all aspects of broadcasting. In these and other instances as established by Congress and the courts, a broadcaster shall not be liable without proof of actual malice or wrongful intent.

Implications of the Proposed Innovations

In order that each of the sections of the model statute shall be interpreted as intended, the sections will be explained in greater detail. The implicatory meanings of the specific words of the various sections shall be considered for the purpose of explanation and analysis.

Implications of Section 1

A federal law of broadcast defamation would supersede all state laws which conflict with any of the provisions set forth in the statute. Similarly, all courts at the federal, state, and local levels would be required to hold in accordance with the federal law regardless of previous holdings under common law. In cases where a matter is at issue which is not provided for under this statute, the courts would be free to apply whatever statutory or common law principles appear applicable in a particular case.

Implications of Section 2

A person defamed by a radio or television broadcast would have a cause of action against the publisher, person initiating the defamation, and the disseminator, broad-

caster, upon establishing to a local magistrate that certain imputations were of a defamatory nature. Imputations of a defamatory nature would include words which have been established as defamatory in the laws of precedent, verbal and non-verbal communications which a reasonable person might interpret as being defamatory, and manipulation of media equipment which a reasonable person might interpret as harming the plaintiff's reputation. A local magistrate would determine whether the individual had a significant cause of action to be sent to the jury. If the plaintiff had a cause of action, and the defendant did not have a privilege or a clear defense, the case would be sent to the jury for the determination regarding liability and the possible assessment of damages.

Implications of Section 3

The state of mind of a broadcaster or disseminator, at the time of a broadcast or before a broadcast, may form the basis of liability. Although actual malice or wrongful purpose may be difficult to prove, it offers the plaintiff an opportunity to recover damages without proof or implication that the defendant was negligent. Instead, liability is based upon a wrongful intent or purpose which accompanied a defamatory broadcast, but may not have in itself caused the imputation.

Implications of Section 4

A defendant would be liable for the breach of a duty

which was the proximate cause of a defamacast. This duty would amount to an exercise of due care to prevent defamatory broadcasts. In all cases where the defendant is charged with negligence, the plaintiff must prove that the defendant owed a duty to exercise due care under the circumstances in a particular case.

Implications of Section 5

In cases where a plaintiff is unable to prove negligence, that plaintiff may allege that negligence should be presumed under the res ipsa loquitor doctrine. This doctrine provides a presumption of negligence for defamation which would not ordinarily occur in the absence of negligence. A defendant could defeat the presumption through proof that active, overt action by the plaintiff or a third person caused the defamatory broadcast; that the defendant lacked control or a right to control the facilities; that the negligence of a third party caused the defamation to occur; or that an act of God caused the defamation to occur. Similarly, a defendant could either defeat recovery or reduce damages through proof of contributory negligence on the part of the plaintiff. If the actions of a plaintiff which cause defamation to occur are interpreted as a voluntary act, beyond negligence, the plaintiff cannot recover damages.

Implications of Section 6

Damages are awarded as compensation for a wrong done

to a plaintiff. General damages are awarded with the assumption that the plaintiff has suffered a harm to his reputation. The extent of that harm need not be proven in every case. If the plaintiff alleges and proves actual harm or loss, special damages, the jury may award damages to the extent warranted by the proof. In cases where the defendant harbored a malicious or wrongful intent while publishing or disseminating defamation, the plaintiff may be awarded exemplary damages upon proof of such intent on the part of the defendant, without the necessity of proving actual harm or loss to his reputation. It therefore becomes imperative that the courts use their best judgment in awarding damages.

This section limits a plaintiff to one cause of action for damages against all of the defendants in a single trial. Once the trial is in progress, a plaintiff will have no further causes of action for that defamatory broadcast. Hence, the single publications rule will be applied with the additional requirement that the causes of action be brought against all defendants in a single trial. The only right of either the plaintiff or the defendant beyond the actual trial would be a right of review or appeal to a higher court.

Implications of Section 7

When defamacast occurs, the broadcaster has a duty to make a reasonable effort to retract the imputation, if

possible, especially in cases where defamacast occurs by accident, appears to be untrue, or is clearly of a defamatory nature. The broadcaster must, however, use caution not to issue a retraction which would only add to the defamation. To guard against the possibility of making an improper retraction the broadcaster should, whenever possible, receive the written consent of the allegedly defamed party. In any event, the broadcasted retraction should be complete and unequivocal, and designed to repair the injured party's reputation. A proper or an improper retraction, including any aspect of a refusal or offer to retract, should be considered by a jury in determination of liability and assessment of damages.

Implications of Section 8

As a minimal requirement of free speech, a right of reply allows an allegedly defamed individual to reply to certain previous imputations. This reply can be made over the same media which broadcasted the imputations. If the right of reply is denied by a broadcaster on the basis of it being unnecessary or inappropriate, the allegedly defamed individual will have one remaining chance to enforce the right of reply. He may present his case to a local magistrate with the hope that the local magistrate will issue a court order to enforce the right of reply. The circumstances surrounding the granting or denial of this right, as well as the content and effect of a broadcasted

reply, may be used as evidence in court for determination of liability and assessment of damages.

Implications of Section 9

An absolute privilege, which completely relieves a defendant from liability, will not be granted with four exceptions: (1) When a public official explains his actions to the public, the official and the disseminator of his information are relieved of liability with regard to what the official communicates to the public. (2) When a plaintiff consents to a defamatory publication, the defendant is not liable. (3) When a political candidate speaks under Section 315 of the Federal Communications Act, the broadcaster has an absolute privilege to disseminate the candidate's speech without liability; however, the candidate may be liable for his own statements. (4) Any other exceptions specifically provided for by Congress shall be included.

Implications of Section 10

A qualified privilege, which relieves a defendant of liability where there is no proof of actual malice or wrongful intent, shields broadcasters with a privilege (1) to report matters of public concern which are of legitimate concern to the community including publication of false statements of fact about individuals connected with all matters of public concern; (2) to report the affairs of public proceedings including legislative proceedings,

investigation of committees, deliberations of municipal councils, and official governmental reports and communications; (3) to broadcast truthful defamatory imputations; and (4) to manipulate media equipment in all aspects of broadcasting.

Advantages of the Proposed Changes

In order to freely accept change, one must recognize potential advantages to be accrued from that change. The writer's proposed model statute offers improvements over the status quo which will benefit plaintiffs, defendants, broadcasters, individuals who have been defamed, and the general public.

Elimination of Most Conflict of Law Problems

A federal law of defamacast with a federal cause of action, with a single publications rule, and with the requirement that all defendants be charged in a single trial would eliminate our present choice and conflict of law problems. This law would mark the end of jurisdictional squabbles to determine which state's law should apply. The federal law would recognize the interstate nature of the tort and would treat it as a single wrongful act for a plaintiff to seek compensation from all applicable defendants.

Eradication of the Irrational and Anomolous Distinctions.

The categories between slander per se, slander per

quod, libel per se, libel per quod, defamation from a prepared script, and ad-libed defamation would be discarded. Certain words would no longer be actionable per se thereby creating liability without proof of damages or negligence or anything else. Defamation from a script would no longer be libelous per se, but would be subjected to the same standards of proof as extemporaneous defamation. Thus, the distinctions which grew out of the sixteenth century would be discarded with regard to radio and television. In their place, the plaintiff would be required to prove that certain imputations were of a defamatory nature and that the defendant either had a malicious or wrongful intent, or was negligent in either a direct or presumed manner.

Equalization of Interests

The proposed changes would provide several new options for both the plaintiff and the defendant which would more nearly balance the interests of each. Strict liability, as it is known under our present laws, places an undue burden upon a defendant, publisher, or disseminator, to be liable without proof of fault or actual damage. The negligence standard, without the option of a presumption under the res ipsa loquitor doctrine, places an unreasonable burden upon the plaintiff to prove that the defendant breached a duty. The interests are more clearly balanced when a plaintiff is given a choice to prove actual malice

or wrongful intent, negligence, or presumed negligence. Although the plaintiff may not be able to prove negligence, it may be presumed through application of the res ipsa loquitor doctrine.

In addition, the plaintiff could also allege that the defendant refused to retract an imputation or offer the plaintiff a reply upon request. The defendant could argue that he offered the plaintiff a change to broadcast a retraction or reply, or in fact did broadcast a retraction or reply. Thus, more variables designed to balance the interests between these parties would be available for consideration by the courts.

Minimization of Mass Media Injuries to Personality

With the discontinuance of truth as a complete defense and absolute privilege, a broadcaster or disseminator would no longer be permitted to broadcast truthful defamatory imputations with a malicious and wrongful intent. If truthful defamatory imputations were published and disseminated, the motives and state of mind of the publisher and disseminator must be sincere and forthright. This would afford a protection against unnecessary injuries to personality.

The categorization of the manipulation of mass media equipment as a qualified privilege serves the same purpose. Although it might be argued that manipulation of equipment should be subjected to a negligence standard of care,

broadcasting equipment should at least be manipulated without malice or wrongful intent.

The issuance of a retraction in certain circumstances may protect a person's reputation from significant harm. Certainly it is better to immediately repair the plaintiff's reputation, if possible, than to further burden that reputation through litigation designed to offer compensation for the defamatory imputation.

In the same manner, a timely and appropriate reply by a defamed person may tend to repair a person's reputation in the public's mind. It cannot be denied that a defamed person should have the right to speak the truth as he sees it regarding his own reputation.

Allowance of Maximum Free Speech with Sufficient Individual Protection

The rights of retraction and reply are found implied in the first amendment's Constitutional guarantee of free speech. Any other interpretation would suggest that one-way communication without provisions for defense and reply to allegations is our concept of free speech. Certainly, by free speech we do not mean freedom for the media powers to castigate an individual in our society with not as much as a "whimper" in terms of a retraction by the publisher or disseminator of the imputation, or a reply by the traduced individual. Our concept of free speech and fair play is more equitable than that. Our ideals are broad enough

to condone a free flow of information in a free society.

The extension of the New York Times' "malice standard" to all matters of public concern is a furtherance of this concept of free speech. It is essential that the media of radio and television broadcast "news" of a public interest to the public without fear of litigation, provided that these media do not entertain a malicious or wrongful intent.

Protection from Unfair Manipulation of Media Equipment

Manipulation of camera lenses, color tones, vocal intonations, and other equipment and techniques may in certain cases defame an individual over radio or television. That our present laws make no provision for this type of defamation is unconscionable. The manipulations of mass media may cause millions of viewers to perceive an individual in an unrealistic and defamatory sense. Certainly, it is in the public interest, convenience, and necessity to provide at least a minimal degree of protection by limiting such manipulation to that conducted with a rightful purpose and intent.

A Hypothetical Case

For the purpose of theoretically projecting applications of proposed innovations in the law, the writer has chosen to expand the hypothetical example of a defamatory broadcast as recorded in the introduction of this research. Let us assume that Mr. Joke Teller was an emcee of a

nationally televised variety program which experienced a decline in ratings. The sponsors of the program insisted that the program increase its ratings or face the possibility of being dropped by the sponsors. The program directors instructed Joke Teller to enliven his program in an effort to boost the program's ratings. Following these instructions, Joke Teller took it upon himself to tell two humorous stories in a nationally televised broadcast about Mr. Executive Citizen, who was a successful President of Appropriate Savings and Loan Association. Joke Teller alleged that "The President of the largest savings and loan company in New York is a 'swinger'" noting that the "swinging activities usually take place in the Beautiful Islands and include many of the other executives in Appropriate." The emcee concluded with a final pun, "If you desire to save and loan, go to Appropriate." One of the other guests on the show, Mr. Smart Guest, commented, "If I had as much money as he owes, it wouldn't be appropriate." The following day a local radio station added to the imputations by falsely reporting that "Appropriate Savings and Loan Association has a financial deficit of over two billion dollars."

Mr. Executive Citizen immediately contacted both the national television network and the local radio station demanding either a retraction or a right of reply. The national network denied both requests on the grounds that the statements were reportedly true and that a retraction

or reply would only further spread the imputation. The local radio station denied the request on the grounds that its statements were true. Mr. Executive Citizen took his cases to a local magistrate who issued a court order to the local radio station to offer Mr. Citizen a right of reply, but denied the request of a national right of reply. Mr. Citizen was granted a two minute reply following the local station's main newscast whereupon he stated that "the statements concerning a broadcasted report of a financial deficit in Appropriate Savings and Loan were false. He further proceeded to explain and reveal the exact financial condition of Appropriate thereby "setting the record strait" as he called it.

Mr. Citizen, however, was not satisfied and proceeded to file separate actions against the national television network and the local radio station. A magistrate determined that both broadcasts were of a defamatory nature and could not find a clear privilege or defense for either defendant. The matter was, therefore, sent to a jury.

In the course of the trial against the national network, the plaintiff argued (1) that the imputations concerning himself were not true, and even if they were, the defendant showed malice in not allowing a retraction or reply; (2) that a retraction or reply would have cleared the plaintiff's reputation in many parts of the country where his reputation was damaged; and (3) that the defend-

and was negligent under the res ipsa loquitor doctrine for if it had not been for the negligence of someone in the network the statements would have been deleted during the "live" broadcast.

The defendant national network countered with arguments that (1) the imputations were true, thereby providing a qualified privilege which would require proof of malice and the defendant network was completely unaware that Mr. Teller was going to make defamatory imputations; (2) a retraction or reply would have enhanced rather than diminished the defamation if broadcasted nationally; and (3) the defendant network was in no way negligent in carrying out its duty to protect the interest of the plaintiff, as the variety show was extemporaneous and out of the defendant's control.

The plaintiff asked for general damages of $500,000; special damages of $300,000; and exemplary damages of $300,000. Mr. Executive Citizen and the national network then proceeded to rest their cases with the jury.

In the same trial, the plaintiff brough a second action against Mr. Joke Teller, publisher of the alleged defamacast. Mr. Teller's only strong defense was that the defamatory statements were true. The plaintiff asked for $200,000 in general damages, $300,000 in special damages, and $300,000 in exemplary damages. After arguments had been heard from both sides, Mr. Citizen and Mr. Teller

rested their cases with the jury.

The jury pronounced its verdict concerning both cases. The jury held in regard to the case against the national network that (1) the imputations concerning the plaintiff were true with the exception of Mr. Smart Guest's comment that "If I had as much money as he owes, it wouldn't be appropriate" which, although defamatory, was extemporaneous and Mr. Guest was not a defendant in this case; (2) the national network could not be liable under the res ipsa loquitor doctrine for the false statement by Mr. Smart because such a statement might normally slip by the censors because of its quick and short duration and difficulty to detect, although the defendant network was in exclusive control; and (3) the defendant's refusal to broadcast a retraction or reply did not constitute malice as a retraction or reply might only have further spread the imputation. The jury however found that the defendant, Mr. Joke Teller, displayed a "malicious and wrongful intent" in broadcasting his truthful defamatory imputations concerning the plaintiff and awarded the plaintiff $50,000 in exemplary damages.

In the second trial the plaintiff, Appropriate Savings and Loan Association, brought an action against the defendant, local radio station, for its follow-up news story with an enlargement of the facts which turned out to be untrue. The plaintiff alleged that (1) the defendant radio station was negligent in not more closely verifying the authenticity of its news; (2) even if the defendant were

afforded a qualified privilege, he would be liable for malice in refusing to retract or offer a reply upon request by the plaintiff; and (3) the plaintiff's reply did not erase the imputation, but only stopped it from becoming even more serious. The defendant offered as defenses (1) that a reasonable effort had been made to verify the accuracy of the news story; (2) that the station was afforded a qualified privilege to report a matter of public concern regarding the plaintiff and that the defendant exhibited no malice or wrongful intent; and (3) that the plaintiff's reply over the defendant's facilities eliminated any harm which could have been done. The plaintiff asked for $300,000 in general damages, $300,000 in special damages, and $300,000 in exemplary damages.

After extensive deliberation, the jury held (1) that the defendant was afforded a qualified privilege to report matters of public concern, as the financial status of Appropriate Savings and Loan Association was a fair comment regarding a matter of public interest; and therefore, the defendant should not be held liable for negligence; (2) that the defendant should be held liable because of the malice and wrongful intent displayed by refusing to retract or offer a reply upon request by the plaintiff and not until forced to do so by a court order; and (3) that the plaintiff's reply over the defendant's station should go

toward mitigation of damages to the extent of $250,000, but that the defendant should be assessed $50,000 in exemplary damages.

Thus, the writer has attempted to construct a hypothetical case as it might logically proceed from the time of broadcast to the time of trial. Although not all of the applicable principles of law proposed in the model statute are used in this example, the flavor of options and fairness with the ultimate determinations to be made by a local magistrate and a jury are significant. Under the old law, a cause of action may have been cut off through application of a legal category and in other cases may have been unjustly awarded. Under the new law, opportunities for litigation based upon common sense and sound legal practice would prevail.

CHAPTER IV

SUMMARY AND CONCLUSIONS

With the advent of the printing press, Henry the VII established the crime of libel to suppress the publication of seditious materials. Since slander had previously been recognized by the law, the distinctions between slander and libel developed. Slander was considered to be oral defamation; while libel was defined as written defamation.

The introduction of the media of radio and television caused the slander-libel distinctions to expand, adding new categories and classifications. Courts recognized differences between slander *per se*, and slander *per quod*, libel *per se*, and libel *per quod*; defamation from a script and extemporaneous defamation; words which are actionable *per se* and words which require proof of special damage; defamation over radio and defamation over television. However, these distinctions and categories as applied to defamation by broadcast proved anomalous and unacceptable.

As a result, in 1962 a Georgia court in *American Broadcasting-Paramount Theatres, Inc. v. Simpson* recognized the distinct characteristics of defamation by broadcast and created a new tort which it termed defamacast. Defama-

cast, which simply means defamation by broadcast, has not been accepted as a new tort in more than a few jurisdictions; however, the need for a separate tort for defamation by broadcast has been recognized by a number of legal theorists.

In fact, present laws of broadcast defamation have generated several problems constituting reasons for concern: (1) The laws vary from state to state resulting in conflict of laws. (2) The slander-libel distinctions as applied to radio and television result in grave inequities and impractical adaptations. (3) Arbitrary lines drawn between actionable and non-actionable words destroy the balance between free speech and the rights of a defamed individual. (4) Present standards of liability for broadcast defamation are unacceptable. (5) Media injuries to personality are placed in a low level category of consideration. (6) The law neglects consideration of potentially harmful aspects of radio and televised communications.

With justifiable reasons for concern, the writer extracted applicable legal principles for the construction of a new law, and considered the implications of the theoretical dimensions of defamacast as a new tort. Defamacast was considered, not merely as a barbarous new term, but as a new tort with recognizable dimensions and related lower level concepts. This was accomplished in the form of a model federal law of broadcast defamation.

The extraction and explication of applicable legal principles provided a basis for construction of the proposed statute. The Uniform Single Publications Act which six states have adopted was incorporated to minimize conflict of law problems. The res ipsa loquitor doctrine which has been a workable part of tort law was applied to balance interests between plaintiffs and defendants. General, special, and exemplary damages were retained in the law to provide alternative methods of compensation. The right of retraction, which ten states have recognized in their statutes; and the right of reply, which European and South American countries have provided in their press (newspaper) legislation, were written into the law to encourage free speech. Finally, absolute and qualified privileges were modified in the proposed statute to achieve equitable results.

Thus, the goal of this research was to construct a federal law which would eliminate conflict of law problems, irrational distinctions, favoritism toward a plaintiff or a defendant, media injuries to personality, and unfair manipulations of media equipment. The effectiveness of the proposed law in meeting these criteria may never be tested; however, the efforts to adapt our laws to the media of radio and television will inevitably transpire.

NOTES

1. Bohlen, "Fifty Years of Torts", 50 Harv. L. Rev. 729-731 (1937); Graham, Defamation and Radio, 12 Wash. L. Rev. 290 (1937).

2. 2 Socolow, Radio Broadcasting 468 (1939); Leflar, "Radio and TV Defamation: 'Fault' or Strict Liability?", 15 Ohio St. L. J. 262 (1954); Newhouse, "Defamation by Radio: A New Tort", 17 Ore. L. Rev. 314 (1938); Harum, "Remolding of Common Law Defamation", 49 A. B. A. J. 149 (1963); Van Os, "Defamation by Broadcast: A Lively Dispute", 2 Houston L. Rev. 249 (1964); Broadfoot, "Defamation in Radio and Television--Past and Present", 15 Mercer L. Rev. 463 (1964).

3. American Broadcasting--Paramount Theatres Inc. v. Simpson, 126 SE 2d 873 (Ga. 1962).

4. Broadfoot, "Defamation in Radio and Television--Past and Present", 15 Mercer L. Rev. 451 (1964).

5. Van Os, "Defamation by Broadcast: A Lively Dispute", 2 Houston L. Rev. 238 (1964).

6. Most of the definitions were taken from Black's Law Dictionary (4th rev. ed. 1968).

7. Ibid. Defamation is a generic rather than a legal term.

8. Green, "Relational Interests," 31 Ill. L. Rev. 35 (1936).

9. Scott v. Sampson, [1882] 8 Q.B.D. 491.

10. Prosser, Torts 754 (3rd ed. 1964).

11. Slander is the speaking of base and defamatory words tending to prejudice another in his reputation, office, trade, business, or means of livelihood. Black, op. cit. supra n. 6 at 1559.

12. Libel is defined as a method of defamation expressed by print, writing, pictures, or signs. Ibid. at 1060.

13. "No brandh of the law has been more fertile of litigation than this (whether plaintiffs be more moved by a keen sense of honour, or by the delight of carrying on personal controversies under the protection and with the solemnities of civil justice), nor has any been more perplexed with minute and barren distinctions. . . . The law went wrong from the beginning in making the damage and not the insult the casue of action." Pollock, Law of Torts 249 (13th ed. 1929).

14. Prosser, op. cit. supra n. 10 at 755.

15. Pollack and Maitland, II A History of English Law 536; Walsh, A History of Anglo-American Law 168, p. 324, no 48 (2d ed. 1932).

16. Prosser, op. cit. supra n. 10 at 755.

17. Walsh, op. cit. supra n. 15.

18. Ogden v. Turner, #1703# 6 Mod. Rep. 104; Mathew v. Crass, #1614# Croc. Jac. 323, 79 Eng. Rep. 276.

19. Prosser, op. cit. supra n. 10 at 755.

20. Walsh, op. cit. supra n. 15 at 326.

21. De Libellis Famosis, #1609#5 Coke 25 a.

22. Prosser, op. cit. supra n. 10 at 755.

23. Walsh, op. cit. supra n. 15 at 326.

24. Prosser, op. cit. supra n. 10 at 755.

25. #1670# King v. Lake, Hardres 470, Skinner 124. For the development of libel as a tort after abolition of the star chamber see, VIII Holdsworth, A History of English Law, 361-378.

26. Harman v. DeLany, #1731# Fitzgibbon 25.

27. #1812# 4 Tanton 355. Also see, Pre-Thorley v. Kerry Case Law of the Libel-Slander Distinction, 23 Chi. L. Rev. 132 (1955).

28. Prosser, op. cit. supra n. 10 at 772.

29. Hellwig v. Mitchell, #1910# 1 K.B. 609.

30. Brooker v. Coffin, 5 Johns., N.Y., 188 (1809); Cullen v. Stough, 258 Pa. 196, 101 A. 937 (1917).

31. Stevens v. Wilber, 136 Or. 599, 300 P. 329 (1931).

32. Prosser, op. cit. supra n. 10 at 773.

33. Ibid. at 744.

34. Ibid.

35. Bihler v. Gockley, 18 Ill. App. 496 (1886); Payne v. Tancil, 98 Va. 262, 35 S.E. 725 (1900).

36. Robins v. Rranks, #1601# Cro. Eliz. 857, 78 Eng. Rep. 1083; O'Cana v. Espinosa, 141 Colo. 371, 347 P. 2d 1118 (1960).

37. Toal v. Zito, 11 Misc. 2d 260, 171 N.Y.S. 2d 393 (1958).

38. Stevens v. Wilber, 136 Or. 599, 300 P. 329 (1931).

39. Carlskale v. Mapledoram, #1788# 2 Term Rep. 473, 100 Eng. Rep. 255.

40. Crittal v. Horner, #1619# Hob. 219, 80 Eng.Rep. 366.

41. Taylor v. Perkins, #1607#Cro. Jac. 144, 79 Eng. Rep. 126

42. James v. Rutledge, #1599# Moore 573, 4 Co. Rep. 17 a, 76 Eng. Rep. 900.

43. Count Joannes v. Burt, 6 Allen, Mass., 236 (1863).

44. Rade v. Press Publ Co., 37 Misc. 254, 75 NYS. 298 (1902).

45. Halls v. Mitchell, #1927# Dom. L. Rep. 163.

46. Collis v. Malin, #1632# Cro. Car. 282, 79 Eng. Rep. 847.

47. Cruikshank v. Gordon, 118 N.Y. 178, 23 N.E. 457 (1890).

48. Nolan v. Standard Pub. Co., 67 Mont. 212, 216 P. 571 (1923).

49. Cavarnos v. Kokkinak, 338 Mass. 355, 155 N.E. 2d 185 (1959).

50. Cobbs v. Chicago Defender, 308 Ill.App. 55, 31 N.E. 2d 323 (1941).

51. Vinson v. O'Malley, 25 Ariz. 552, 220 P. 393, 37 A.L.R. 877 (1923).

52. Danncey v. Holloway, #1901# 2 K.B. 441.

53. Buck v. Hersey, #1850# 31 Me. 558.

54. Prosser, op. cit. supra n. 10 at 778.

55. Marion v. Davis, 217 Ala. 16, 114 So. 357, 55 A.L.R. 171 (1927).

56. Davis v. Sladden, 17 Or. 259, 21 P. 140 (1889).

57. Prosser, op. cit supra n. 10 at 778.

58. Ibid. at 779.

59. Walker v. Tucker, 220 Ky. 363, 295 S.W. 138, 53 A.L.R. 547 (1927).

60. Shipe v. Schenk, Mun. App. D.C., 158 A. 2d 910, (1960).

61. Johnson v. Nielson, 92 N.W.2d 66, (N.D. 1958).

62. Cobb. v. Tinsley, 195 Ky. 781, 243 S.W. 1009 (1922).

63. Craney v. Donovan, 92 Conn. 236, 102 A. 640 (1917).

64. Pion v. Caron, 237 Mass. 107, 129 N.E. 369 (1921).

65. Sweet v. Post Pub. Co., 215 Mass 450, 102 N.E. 660 (1913).

66. Elms v. Crane, 118 Me. 261, 107 A. 852 (1919).

67. Field v. Colson, 39 Ky. 347, 20 S.W. 264 (1892).

68. Thorley v. Lord Kerry, #1812# 4 Taunt. 355, 128 Eng. Rep. 367.

69. Prosser, op. cit. supra n. 10 at 782.

70. Morrison v. Ritchie & Co. #1902# 4 Fraser, Sess. Cas.,645, 39 Scot. L. Rep. 432. The defendant's newspaper published a report that the plaintiff had given birth to twins and there were readers who knew that she had been married only one month.

71. Thayer v. Worchester Port Co., 284 Mass. 160, 187 N.E. 292 (1933).

72. Tarpley v. Blabey, 2 (Bing) N.C. 437 (1836).

73. Monson v. Tursaunds, #1894# 1 Q.B.D. 671.

74. Johnson v. Commonwealth, 14 Atl. 425 (Pa. 1888).

75. Eryre v. Carlick, #1878# 42 J.P. 68.

76. De Libellis Famosis, #1605# 5 Co.Reg. 125 a, 77 Eng.Rep. 250.

77. Cox v. Nat'l Loan & Exchange Bank,130 S.C. 381, 136 S.E. 637 (1927).

78. Jefferies v. Duncombe, #1809# 11 East 226, 103 Eng.Rep. 991.

79. Cook v. Cook, 3 Mass. 110 (1814).

80. Berry v. City of New York Ins. Co., 210 Ala. 369, 89 So. 290 (1923).

81. Peterson v. Western Union Tel. Co., 65 Minn. 18, 67 N.W. 646 (1896).

82. Calif. Civil Code § 45, 46 (Deering 1949); Mont. Rev. Code 64-203 (1953); Okla. Stat. Ann. tit. 12, § 1441(1937); Prosser op. cit. supra n. 10 at 770.

83. The defamatory gestures or sign language of a deaf mute are registered as slander. Prosser, op. cit. supra n. 4 at 770.

84. Ibid. at 771.

85. Hartman v. Winchell, 296 N.Y. 300, 73 N.E.2d 30 (1947).

86. Ostrowe v. Lee, 256 N.Y. 36, 175 N.E. 505 (1931).

87. Broadfoot, op. cit. supra n. 4 at 454. See also,"Capacity for Harm Theory," 42 Va. L. Rev. 63 (1956); Restatement, Torts § 568 (1938)/(Hereafter cited Restatement).

88. The American Law Institute discussed the tests at its 1935 meeting and incorporated their thoughts into the Restatement of Torts § 568 (1938). The first radio defamation case was decided in 1932, Sorenson v. Wood, 123 Neb. 348, 243 N.W. 82, 82 A.L.R. 1098.

89. 32 Wash. U. L. Q. 285 (1957).

90. Ibid.

91. Ibid.

92. Hartm

92. Hartman v. Winchell, 296 N.Y. 296, 73 N.E.2d 30 (1947). See notes in 10 Ga. B. J. 250 (1947), 46 Mich. L. Rev. 645 (1947) and 26 Tex. L. Rev. 221 (1947).

93. Ibid. at 33.

94. For a discussion of motion picture cases see supra n. 3.

95.

89. The court held extemporaneous remarks calling one a communist over television as slanderous per se. Remington v. Bentley, 88 F. Supp. 166 (1949). See notes in 50 Colum. L. Rev. 526 (1950) and 36 Va. L. Rev. 402 (1950).

90. Landau v. Columbia Broadcasting System, Inc., 128 N.Y.S. 2d 254 (1951).

91. Locke v. Gibbons, 164 Misc. 877, 209 N.Y.S. (Sup. Ct.) Aff'd, 253 App. Div. 877, 2 N.Y.S. 2d 1015 (1937). For a criticism of this basis see Donnley, "Defamation by Radio, A Reconsideration," 34 Iowa L. Rev. 1215 (1948).

92. Irwin v. Ashurst, 158 Ore. 61, 74 P. 2d 1127 (1938).

93. Remington v. Bentley, 88 F. Supp. 166 (S.D.N.Y. 1949).

94. Shor v. Billingsley, 158 N.Y.S. 2d 475 (Sup. Ct. 1956). See notes in 71 Harv. L. Rev. 384 (1957), 35 Tex. L. Rev. 854 (1957), and 32 Tul. L. Rev. 135 (1957).

95. See Vold, "The Basis for Liability for Defamation by Radio", 19 Minn. L. Rev. 611 (1935); Vold, Defamatory Interpolations in Radio Broadcast, 88 U. Pa. L. Rev. 249 (1940); Haley, The Law of Radio Programs, 56 Wash. L. Rev. 157 (1937); Fornum, Radio Defamation and the American Law Institute, 16 B.U.L. Rev. 1 (1936)

96. See Davis, Law of Radio Communications 160 (1927); Sprague, "Freedom of the Air", 8 Air L. Rev. 30 (1937); Guides, Liability for Defamation in Political Broadcast, 2 J. Radio 1.

97. Sorenson v. Wood, 123 Neb. 348, 353, 243 N.W. 82, 85 (1932).

98. Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A. 2d 302 (1939).

99. Vold, "The Basis for Liability for Defamation by Radio", 19 Minn. L. Rev. 647 (1935).

100. Coffey v. Midland Broadcasting Co., 8 F. Supp. 889 (W. D. Mo. 1934).

101. Bartenstein, Fred Jr., "A New Development in the Law of Radio Defamation," Washington and Lee Law Review, 1:103-15, Fall, 1939; Finley, "Defamation by Radio," The Canadian Bar Review, 19:353-347, May, 1941.

102. Harum, op. cit. supra n. 2 at 154.

103. Brott, Eugene E., "Statutes Concerning Broadcast Defamation", (thesis), University of Illinois, 1959 p. 9 (1959).

104. California, Colorado, Florida, Georgia, Iowa, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wyoming.

111. Arkansa, California, Colorado, Georgia, Idaho, Kansas, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Nebraska, Nevada, New York, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia, West Virginia, and Wyoming.

112. Georgia, Louisiana, Oregon, and Wyoming.

113. Florida, and New Mexico modified section 1 of NAB's statute to define due care as compliance with any rules and regulations of the federal government. Indiana, Montana, North Carolina, Utah, and Washington have older statutes which accomplish some of the same purposes as the NAB model.

114. California, Indiana, North Carolina, Ohio, Oregon, Utah, and Washington.

115. Ashley, Say it Safely: Legal Limits in Journalism and Broadcasting 92 (University of Washington Press: Seattle, 1959)

116. Kelley, "Defamation by Mass Communication Media: Some Problems," 32 U. Cin. L. Rev. 529 (1963).

117. Prosser, op. cit. supra n. 10 at 783.

118. This writer uses the phrase "tunnels of distinction" to imply (1) that courts suffer from "tunnel vision" by following the laws of precedent causing application of the slander-libel distinctions to broadcasting and (2) that these "distinguished" courts hesitate to break tradition.

119. Summit Hotel v. N. B. C., 336 Pa. 182, 8 A2d 302; Kelly v. Hoffman, 137 N.J.L. 695, 61 A2d 143; Irwin v. Ashurst, 158 Or. 61, 74 P.2d 1127.

120. This is evidenced by many of the previously cited cases.

121. Lynch v. Lyons, 303 Mass. 116, 20 N.E.2d 953; Miles v. Lyons Wasmer, Inc., 172 Wash. 466, 20 P.2d 847; Singler v. Journal Co., 218 Wis. 263, 260 N.W. 431.

122. Wright, "Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach," 46 Texas L. Rev. 634 (1968).

123. Harum, op. cit. supra n. 2 at 153.

124. Van Os, op. cit. supra n. 2 at 246.

125. Sharpo, "Media Injuries to Personality: An Easay on Legal Regulation of Communication," 46 Texas L. Rev. 657 (1968).

126. Ibid. at 666.

127. Ibid. at 659.

128. Wright, op. cit. supra n. 122 at 648.

129. Levin, Broadcast Regulation and Joint Ownership of Media 10 (New York University Press, 1960).

130. Newsweek, "Tips, Tip-offs, Come-ons," June 22, 1970, p. 87.

131. Ibid.

132. Pincus, Guide to Filmmaking, p. 128 n. 44 (The New American Library, Inc.: New York, 1969).

133. Huntley, "Color as an Emotional Factor in Television," 2 Journal of Broadcasting 259 (1957-58).

134. Ibid. at 262

135. Op. cit. supra n. 3.

136. Ibid. at 236.

137. Ibid. at 238 in which the court cites: Holmes, The Common Law 36 (1881); Cardozo, The Growth of the Law 133 (1924); and Brandeis in Washington v. W. C. Dawson and Co., 264 U.S. 236, 44 S.Ct. 3021, 68 L.E. 646 (1924), where he said, "Modification implies growth."

138. Op. cit. supra n. 3 at 236.

139. The court quoted from Durkworth, J. (now C. J.) in Hornby v. Smith, 191 Ga. 500, 135 S.E.2d 20 (1941).

~~Notes~~

1. Warren and Brandeis, "The Right of Privacy", 4 Harv. L. Rev. 193 (1890).

2. Prosser, op. cit. supra n. 10 at 832.

3. Op. cit. supra n. 2. ~~Hanging 468 (1939); Leflar, "Radio and TV Defamation: 'Libel' or 'Slander'?", 1 Ohio St. L. J. 261 (1954); Newhouse, "Defamation by Radio: [illegible]", 17 Ore. L. Rev. 314 (1938); Harum, "Remolding Common Law Defamation", 40 A. B. A. J. 149 (1963); Van Os, "Defamation by Broadcast: A Lively Dis[illegible]", 2 Houston L. Rev. 249 (1964); Broadfoot, "Defamation in Radio and Television--Past and Present", 15 Harper L. Rev. 463 (1964).~~

~~4. Locke v. Park Entertainments, 249 Mass. 268, 1 N.E. 2d 41 (1936), (picture); Monson v. Tussands, 1894 1 Q.B. 671 (statute).~~

4. Korbel, "Defamation by Broadcast: The Need for Federal Control", 49 A. B. A. J. 771 (1963).

5. Duke of Brunswick v. Harmer, 14 Q.B. 185, 177 Eng. Rep. 75 (1849). This case held that a book sold seventeen years after the publication date constituted a new cause of action.

6. This doctrine was indorsed by the American Law Institute in its Restatement, Conflict of Laws § 377 (1934); however its position changed in Restatement (Second) Conflict of Laws § 379 1 (1963): "The local law of the state which has the most significant relationship with the occurence and with the parties becomes their rights and liabilities in tort".

7. Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir. 1962), cert. denied, 372 U.S. 912 (1963).

8. Age-Herald Publishing Co. v. Huddleston, 207 Ala. 40, 92 So. 193 (1921).

9. Hartmann v. Time, Inc., 64 F. Supp. 671, 679 (E.D.Pa. 1946).

10. Kelley, op. cit. supra n. 116 at 530. [illegible] Media: Some Problems", 32 U. Chi. L. Rev. 530 (1965).

11. Dale System, Inc. v. General Teleradio, Inc., 105 F.Supp. 745 (S.D.N.Y. 1952).

12. Kemart Corp. v. Printing Research Laboratories, Inc., 269 F.2d 375 (9th Cir. 1959), cert. denied, 361 U.S. 893 (1959).

13. Kelly, op. cit. supra n. 116.

14. Ibid. See also, Morris, "The Proper Law of a Tort, 65 Harv. L. Rev. 881 (1951); Harper, "Policy Bases of Conflict of Laws", 56 Yale L. J. 1155 (1947); Strumberg, "The Place of the Wrong--Torts and the Conflict of Laws", 34 Wash. L. Rev. 388 (1959).

15. Bigelow v. Sprague, 140 Mass. 425, 5 N.E. 144 (1886); Fried, Mendelson, & Co. v. Edmund Halsterd, Ltd., 203 App. Div. 113, 196 N.Y.S. 285 (1922).

16. Arizona(Ariz. Civ. Cd., 1954 Sup. § 27-2001 to 27-2005); California (West Anot. Civ. Cd.,§ 3425.1 to 3425.5); Idaho(Idaho Cd., § 6-702 to 6-705); New Mexico (N. M. L. 1955, c 5); North Dakota (N. D. Rev. Cd. 1953 Sup.,§ 14-0210); Pennsylvania (Purdon Pa. Stat.,§ 2090.1 to 2090.5).

17. Brott, "Statutes Concerning Broadcast Defamation", Master of Science Thesis in Journalism from Univ. of Illinois at p. 12 (1959). See also, Leflar, "The Single Publication Rule", 25 Rocky Mt. L. Rev. 263; Notes, 15 Wash. & Lee L. Rev. 321 (1953); 44 Cal. L. Rev. 146 (1956).

18. Korbel, op. cit. supra n. 143.

19. Wright, op. cit. supra n. 122 at 644.

20. The interstate commerce clause of the U. S. Constit. art. I, § 9 reads "That Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several states. . .."; The First Amendment provides that "Congress shall make no law. . . abridging the freedom of speech, or of the press. . ."; The Fourteenth Amendment extends Congressional authority, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

21. Prosser, op. cit. supra n. 10 at p. 785.

22. Louka v. Park Entertainments, 294 Mass. 268, 1 N.E. 2d 41 (1936) (picture); Monson v. Tussands, [1894] 1 Q.B. 671 (statute).

23. Weaver v. Beneficial Finance Co., 199 Va. 196, 98 S.E. 2d 687 (1957). See Painter, "Republication Problems in the Law of Defamation", 47 Va. L. Rev. 1131 (1961).

24. Prosser, op. cit. supra n. 10 at page 787.

25. Ibid. at 789.

26. Restatement, § 578, comment b (1938).

27. Ibid., comment c.

28. Harum, op. cit. supra n. 2 at 152, 49 A. B. A. J. 152 (1963).

29. Restatement § 581, comment a.

30. Bohlen, "Fifty Years of Torts", 50 Harv. L. Rev. 731 (1937).

31. Ibid.

32. Restatement § 581.

33. Restatement § 568, comment f.

34. Restatement § 568 (3).

35. Prosser, op. cit. supra n. 10 at 791.

36. Switzer v. Anthony, 71 Colo. 291, 206 P. 391 (1922).

37. Martin v. The Picayune, 115 La. 979, 40 So. 376 (1906).

38. Prosser, op. cit. supra n. 10 at 792. See Macfadden's Publications v. Turner, Tex. Civ. App., 95 S.W. 2d 1027 (1936).

39. Van Os, op. cit. supra n. 2 at 244.

40. Ibid. See also, Keller, "Federal Control of Defamation by Radio", 12 Notre Dame Law. 134 (1937); Vold, op. cit. supra n. 105 at 611.

41. Van Os, op. cit. supra n. 2 at 244. (A station might transfer responsibility for payment of damages to the speaker through increased charges for time spots to aid in payment of defamation insurance premiums). See Keller, op. cit. supra n. 40; Vold, op. cit. supra n. 105; Donnelly, "Defamation by Radio: A Reconsideration", 34 Iowa L. Rev. 12 (1948); Vold, "Extemporaneous Defamation: A Rejoinder", 25 Marq. L. Rev. 56 (1941).

42. Van Os, op. cit. supra n. 2 at 244; Harum, op. cit. supra n. 2 at 150.

43. Van Os, op. cit. supra n. 2 at 245. See also, Cowles v. City of Minneapolis, 128 Minn. 452, 151 N.W. 184 (1915).

44. Van Os, op. cit. supra n. 2 at 246.

45. Ibid. at 249.

46. Ibid.

47. Ibid. See also, Jesconowski v. Boston & Me. R. R., 329 U.S. 452 (1947); Gray v. Laughlin, 207 Ark. 191, 179 S.W. 2d 686 (1944); 9 Wigmore, Evidence § 2509 (3d 3d. 1940); Black, op. cit. supra n. 6 at 505.

48. Ibid.

49. Black, op. cit. supra n. 6 at 466.

50. Ibid.

51. Harum, op. cit. supra n. 2 at 151.

52. Black, op. cit. supra n. 6 at 468.

53. Ibid. at 469.

54. Ibid. at 467.

No space

55. Purcell v. Westinghouse Broadcasting Co., 411 Pa. 167, 191 A. 2d 662 (1963).

56. Section 3 of a model statute relating to defamation by radio and television, parepared by the Legal Department, National Association of Broadcasters (1954).

57. Ariz. Rev. Stat. title 12, § 652 (1956).

58. Neb. Rev. Stat. § 86. 603 (1943).

59. Wyo. Comp. Stat. Ann. § 3-8205 (1945).

60. Ga. Code Ann. § 105-714 (1949).

61. La. Rev. Stat. Ann. title 45, § 1353 (1956).

62. Ore. Rev. Stat. Ann. title 45, § 30.155 (1955).

63. Md. Code Ann. Art. 75, § 6b (1952).

64. Alabamba, Arizona, California, Deleware, Florida, Georgia, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Nebraska, Oklahoma, Oregon, Utah, and Wyoming.

65. Alabamba, Arizona, Arkansa, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming.

66. Cal. P. C. 1949, § 258.

67. N. D. Rev. Cd., § 12-2815.

68. Alabamba, California, Deleware, Florida, Indiana, Oregon, Kentucky, North Carolina, Massachusetts, Oklahoma, Ohio, Utah, and Washington.

69. Black, op. cit. supra n. 16 at 1153.

70. Prosser, op. cit. supra n. 10 at 826. See Note, 39 Harv. L. Rev. 867 (1922); Morris, "Inadvertent Newspaper Libel and Retraction", 32 Ill. L. Rev. 36 (1937); Leflar, "Legal Remedies for Defamation", 6 Ark. L. Rev. 423 (1952).

71. O'Conner v. Field, 266 App. Div. 121, 41 N.Y.S. 2d 492 (1943).

72. Meyerle v. Pioneer Pub. Co., 45 N.D. 568, 178 N.W. 792 (1920).

73. See Note, 35 Harv. L. Rev. 867 (1922).

74. Ibid. See Reid v. Nichols, 166 Ky. 423, 179 S.W. 440 (1915).

75. Luna v. Seattle Times Co., 1936, 186 Wash. 618, 59 P. 2d 753, 105 A.L.R. 932.

76. Brogan v. Passaic Daily News, 22 N.J. 139, 123 A. 2d 473 (1956).

77. Coffman v. Spokane Chronicle Pub. Co., 65 Wash. 1, 117 P. 596 (1911).

78. Donnelly, "The Right of Reply: An Alternative to an Action for Libel," 34 Virginia L. Rev. 884 (1948).

79. The complete press laws of most foreign countries are collected in Shearmand and Rayner, The Press Laws of Foreign Countries (1926); and Sharp, "The Censorship and Press Laws of Sixty Countries," U. of Mo. Bull. J. Ser. Vol. 37, No. 24 (1936).

80. Nev. Comp. Laws Ann. § 10506 (1929).

81. Miss. Code Ann. § 3175 (1942).

82. Donnelly, 34 Virginia Law Rev. 896 (1948).

83. Cochrane v. Wittbold, 359 Mich. 402, 102 N.W. 2d 459 (1960).

223. Bloustein, "Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?", 46 Texas L. Rev. 666 (1968).

85. 130 The Economist 379 (1938).

86. Mencher v. Chesley, 297 N.Y. 94, 75 N.E. 2d 257 (1947)

87. Although several states have retraction statutes, no state has both a retraction and a reply statute.

88. Prosser, op. cit. supra n. 10 at 796.

90. Kennedy v. Cannon, 229 Md. 92, 182 A. 2d 54 (1962).

91. McGovern v. Martz, D.C. D.C., 186 F. Supp. 343 (1960).

92. Byron, "Publication of Record Libel," 5 Va. L. Rev. 513; Barnett, "The Privelege of Defamation by Private Report of Public Official Proceedings," 31 Or. L. Rev.(1952).

93. Prosser, op. cit. supra n. 10 at 802. See Matson v. Margiotti, 371 Pa. 188, 88 A 2d 892 (1952).

94. Patrick v. Thomas, 376 P. 2d 250 (Okl. 1962).

95. Arvey Corp. v. Peterson, E. D. Pa. 1959, 178 F. Supp. 132.

96. Smith v. Dunlop Tire and Rubber Co., 186 S. C. 456, 196 S.E. 174(1938).

97. Federal Communications Act of 1934, 47 U.S.C.A. § 315.

98. Prosser, op. cit. supra n. 10 p. 805 as quoted from Tosgood v. Spyring, [1834], 1 C.M. & R. 181, 149 Eng. Rep. 1044.

99. Ibid.

100. Morse v. Times-Republican Co., 124 Iowa 707, 100 N.W. 867 (1904).

101. Prosser, op. cit. supra n. 10 at 812.

102. Swearingen v. Parkersburg Sentinel Co., 125 W. Va. 731, 26 S.E. 2d 209, (1943) (audit of fiscal affairs of city).

103. Knapp v. Post Printing & Pub. Co., ~~254 N.Y. 95, 172 N.E. 139, 72 A.L.R. 913 (1930).~~ 111 Colo. 492, 144 P. 2d 981 (1943).

No spare

104. Hoeppner v. Dunkirk Printing Co., 254 N.Y. 95, 172 N.E. 139, 72 A.L.R. 913 (1930).

244. Yancey v. Gillespie, 242 N.C. 227, 87 S.E.2d 210 (1955).

245. Klos v. Zahorik, 113 Iowa 161, 84 N.W. 1046 (1901). (Schools, charities, and churches are included.

246. A business dealing with the public is not enough unless it is a matter of public concern. Barker v. State, 199 Ark. 1005, 137 S.W.2d 938.

247. Cf. Julian v. American Business Consultants, 2 N.Y.2d 1, 155 N.Y.S.2d 1, 137 N.E.2d 1 (1956) (Alleged Communist infiltration of radio and television industry)

248. New York Times Company v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964).

249. Bloustein, op. cit., supra n. 223 at 621.

250. Prosser, op. cit. supra n. 10 at 816.

251. Garby v. Bennett, 166 N.Y. 392, 59 N.E. 1117 (1901). See Bryan, "Publication of Record Libel," 5 Va. L. Rev. 513 (1918).

252. Cresson v. Louisville Courier Journal, 299 F. 487, (1924). See note in 59 Col. L. Rev. 521 (1959).

253. Swede v. Passaic Daily News, 30 N.J. 320, 53 A.2d 36 (1959).

254. Branden v. Gazette Pub. Co., 234 Ark. 332, 352 S.W.2d 92 (1961) (report to governor concerning an official investigation).

255. Lewis v. Hayes, 165 Cal. 527, 132 P. 1022 (1913) (casual conversation at a social banquet). It has been held that there is no privilege to report the proceedings of the stockholders of a corporation in Kimball v. Post Pub. Co., 199 Mass. 248, 85 N.E. 103 (1908).

256. Barrows v. Bell, 7 Gray, Mass. 301 (1856).

257. Lehner v. Berlin Pub. Co., 209 Wis. 536, 245 N.W. 685 (1932); Hughes v. Washington Daily News, 90 App.D.C. 155, F.2d 922 (1952).

258. Prosser, op. cit. supra n. 10 at 825.

259. See note in 56 Nw. U. L. Rev. 547 (1961).

260. Ibid.

261. Ibid. See Ray, "Truth: A Defense to Libel," 16 Minn. L. Rev. 43 (1931); Harnett and Thornton, "The Truth Hurts: A Critique of a Defense of Defamation," 35 Va. L. Rev. 425 (1949).