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Torts - Libel and Slander

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The State of Washington has allowed treble damages for willful conversion of fruit trees.[14]

In summary, *Barnes* v. *Moore* places Virginia in accord with the view of the majority concerning damages for timber trespass as exemplified by the Restatement and the *Wooden Ware* case views. It is submitted that in future cases, whenever a trespass resulting from an intentional or grossly negligent act is involved, consideration be given to the benefits obtainable from the utilization of the Virginia treble damage statutes.

H. D. M.

TORTS—LIBEL AND SLANDER

The incredible judicial inertia,[1] which has existed since the sixteenth century[2] in regard to the alleged distinction between libel and slander,[3] has been overcome at long last in the recent New York case of *Shor* v. *Billingsley*.[4] An action for defamation was instituted on the basis of certain interpolations, disparaging to the plaintiff, made by the defendant on his television show.

The statements upon which this action was predicated were as follows:

"Mr. Billingsley: Yes, he (Plaintiff) is. Want to know something? I wish I had as much money as he owes."

"Mr. Birsson: Owes you or somebody else?"

"Mr. Billingsley: Everybody—oh, a lot of people." [5]

Defendant's main contentions were that there was no def-

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[14] Lawson v. Helmich et al., 146 P.2d 537 (1944).

[1] Prosser on Torts, Ch. 19, §93, pp. 595-596 (2nd Ed.) (1955).

[2] Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 41 L.Q.Rev. 13 (1925); Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 40 L.Q.Rev. 302 (1924).

[3] "Libel was originally written defamation, while slander was oral; the present tendency is to make the distinction on the basis of permanence of form, or potentiality of harm, similar to writing or printing." Prosser on Torts, Ch. 19, §93, pp. 584-596 (2nd Ed.) (1955).

[4] 158 N.Y.S.2d 476 (1956) on Reargument, Jan. 8, 1957.

[5] *Ibid.* at 478.

amation in the above statement for it would be no idle wish that one had as much money as some of our 20th century financial wizards would owe on any given date; that even if the statement did constitute defamation, they sounded in slander and allegations and proof of special damages are required; and that the court was without precedent or authority that the statements constituted libel, such authority being vested in the legislature.

The real problem of the case was to determine whether the action sounded in libel or in slander. This precise question, whether interpolations, defamatory in nature, made on a television show are libelous or slanderous, had never before been passed upon in either the New York courts or in any other jurisdiction.

The court in the instant case, relying heavily on the "dicta" contained in the concurring opinion of Fuld, J., in *Hartman* v. *Winchell*,[6] held that it was for the jury to determine if the statements were defamatory; that they could not say as a matter of law that the statements were not defamatory. They were also of the opinion that, regardless of the lack of precedent for holding such statements libelous, "courts sometimes of necessity abandon their search for precedents, and yet sustain a recovery upon legal principles clearly applicable to the new state of facts, although there is no direct precedent for it, because there had never been an occasion to make one." [7] In disposing of the contention that the legislature alone could apply the law of libel, the court stated:

> Legislative action there could, of course, be, but we abdicate our own function, in a field peculiarly non-statutory, when we refuse to reconsider an old and unsatisfactory court-made rule . . . The common law does not go on the theory that a case of first impression pre-

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[6] 296 N.Y. 296, 73 N.E.2d 30, 171 A.L.R. 759 (1947) wherein he stated: "Broadcasting defamatory matter which has not been reduced to writing should be held libelous because of the potentially harmful and widespread effects of such defamation and because of the likelihood of aggravated injury inherent in such broadcasting."

[7] Kuzek v. Goldman, 150 N.Y. 176, 178, 44 N.E. 773, 774, 34 L.R.A. 156 (1896).

sents a problem of legislative as opposed to judicial power.[8]

Thus the court found that the interpolations were libel rather than slander.

The history of the development of defamation, which is made up of the twin torts of libel and slander, has been erratic, following no particular aim or plan, with, in many instances, little rhyme or reason.[9] Libel was originally written defamation and was actionable without proof that damage had occurred.[10] Originally, slander was oral defamation and was not actionable without proof of actual damage. To this the courts very early established certain specific exceptions: the imputation of crime, a loathsome disease, or unchastity to a woman, or imputations affecting the plaintiff in his trade, business, profession, office, or calling. In the development of libel, with the carving out of exceptions and with the extensions which crept into the law, the distinction became a question of whether the defamatory statement was embodied in some more or less permanent form. Today courts distinguish between defamation which is libel *per se* and that which is libel *per quod*,[11] requiring of the latter proof of actual damage.

The advent of new means of communication served to further the complexity which had already arisen. Courts found little difficulty in applying the law of libel to motion pictures,

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[8] Woods v. Lancet, 303 N.Y. 344, 355-356, 102 N.E.2d 691, 694, 27 A.L.R.2d 1250 (1951). And see Funk v. U.S., 290 U.S. 371, 54 S.Ct. 212, 78 L.Ed. 369 (1933); Rozell v. Rozell, 281 N.Y. 106, 22 N.E.2d 254, 123 A.L.R. 1015 (1939); Hazopian v. Samuelson, 236 App.Div. 491, 260 N.Y.S. 24 (1932).

[9] See Donnelly, *History of Defamation*, (1949) Wis.L.Rev. 99; Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 1924, 40 L.Q. Rev. 302, 41 L.Q.Rev. 13; Carr, *The English Law of Defamation*, 1902, 18 L.Q.Rev. 255, 388; Courtney, *Absurdities of the Law of Slander and Libel*, 1902, 36 Am.L.Rev. 552.

[10] This represents the English and American minority view. And see *Restatement of Torts*, §569.

[11] This represents the American majority view and these courts treat libel as slander for the purpose of determining whether proof of actual damages is a necessary prerequisite to recovery. See Ilitzy v. Goodman, 57 Ariz. 216, 112 P.2d 860 (1941); Felix v. Hoffman, 188 Md. 273; 52 A.2d 976 (1947); Chase v. New Mexico Pub. Co., 53 N.M. 145, 203 P.2d 594 (1949).

the sound tract being so closely identified with the film itself.[12] However, violent debate still exists as to defamation by radio[13] with some courts holding it to be libel,[14] with at least one holding it to be slander,[15] with one holding it libelous if read from a script but slanderous if not,[16] and with others regarding it as somewhere in between libel and slander.[17] Attempts at regulation by statute have shown similar disagreement, some treating the defamation as libel,[18] others as slander,[19] and others as both.[20]

It is hoped that much discussion will be attendant upon this decision. As has been pointed out by Professor Prosser,[21] one reason the law in this area has remained unchanged so long is that there has been a violent dispute as to the direction in which it should move. This has, in part, accounted for the judicial inertia, for the law is in the main conservative, as are the members of the bench, and movement solely for the purpose of movement is a poor substitute for the consistent inconsistencies of gradual evolution through exceptions to settled rules. Four major proposals have been advanced to reconcile libel and slander in terms of Twentieth Century existence:

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[12] Youssoupoff v. Metro-Goldwyn-Mayer, 99 A.L.R. 864 (1934); Oklahoma Pub. Co. v. Givens, C.C.A. 10th Cir., 67 F.2d 62 (1933); Kelly v. Loew's, 76 F.Supp. 473 (1948).

[13] Vold, *The Basis for Liability for Defamation by Radio*, 19 Minn.L.Rev. 611 (1935); Vold, *Defamatory Interpolations in Radio Broadcasts*, 88 U.Pa.L.Rev. 249 (1940); Newhouse, *Defamation by Radio: A New Tort*, 17 Ok.L.Rev. 314 (1939); Graham, *Defamation and Radio*, 24 Minn. L.Rev. 118 (1939); Donnelly, *Defamation by Radio, a Reconsideration*, 34 Iowa L.Rev. 12 (1948); Notes, 1946, Harv.L.Rev. 133; 1947, 33 Va.L.Rev. 612; 1941, 39 Mich.L.Rev. 1002.

[14] Sorenson v. Wood, 123 Neb. 348, 243 N.W. 82 (1932); Coffey v. Midland Broadcasting Co., 8 F.Supp. 889 (1934). The English Defamation Act of 1952, 15 & 16 Geo. VI & Eliz. II, c. 66, cl. 1-2, makes radio defamation libel.

[15] Melcrum v. Australian Broadcasting Co., 1932, Vict.L.Rep. 425, (1932), Austl.Rep. 452.

[16] Hartman v. Winchell, 296 N.Y. 296, 73 N.E.2d 30 (1947); Hryhoriejev v. Winchell, 180 Misc. 574, 45 N.Y.S.2d 102 (1943).

[17] Summit Hotel Co. v. N. B. Co., 336 Pa. 182, 8 A.2d 302 (1939); Kelly v. Hoffman, 137 N.J.L. 695, 61 A.2d 142 (1948).

[18] Illinois S.H.A. Ch. 38, §§404.1 to 404.4; Wash.Rev.Stat. Ann., Remington Supp. 1940, §§2424, 2427.

[19] California Civ. Code, §46; North Dakota N.D.R.C. 1943, 12-2815.

[20] Florida F.S.A. §770.03; Int.Stat., Burn's Ann.St. §2.518; Mont.Rev.Code, 1939 Supp., c. 3A, §5694.1.

[21] Prosser on Torts, Ch. 19, §93, pp. 595-596 (2nd Ed.) (1955).

1. To require in all cases, proof of actual damage as essential to the existence of a cause of action;[22]
2. To make all defamation, oral or written, actionable without proof of damage;[23]
3. To distinguish upon the basis of the extent of publication;
4. To distinguish between minor and major defamatory imputations, having regard to all extrinsic facts, and to make only the latter actionable without proof of damage.

Professor Prosser predicted as early as 1941[24] that a combination of the last two proposals seems "most likely to be adopted." [25] The New York Court has done just this, recognizing that "if considerations of principles are to control, there is no valid reason why the same consequences should not attach to publication through the medium of radio broadcasting (and television) as flow from publication through the medium of writing." [26]

Although the court in the instant case did not overrule the *Hartmann* case, *supra*, since the question of radio broadcasting was not properly before it, there is little doubt that the present decision could be a precedent for the adoption of the same or a similar rule in respect thereof. Both radio and television reach audiences greater by far than those of newspapers and the injury capable of infliction is, thus, at least as great if not greater.

The New York Court, recognizing that "the law went wrong from the beginning in making the damage and not the insult the cause of action",[27] has adopted the philosophy of Judge Cardozo:[28]

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[22] Publishers are extremely favorable to this proposal.

[23] This is the law in Louisiana. It is also the law in Scotland, and by Statute in Queensland and New South Wales and has been adopted in Alberta and Manitoba by recognition of the Canadian Uniform Act.

[24] Prosser on Torts, Ch. 19, §92, pp. 807-809 (1941).

[25] *Ibid.* at 809. The French Law substantially conforms to this and has since May 17, 1819.

[26] Hartmann v. Winchell, 296 N.Y. 296, 306, 73 N.E.2d 30, 34, 171 A.L.R. 759 (1947).

[27] Pollock, *Law of Torts*, 13th Ed., 243, 249 (1929).

[28] MacPherson v. Buick Motor Co., 217 N.Y. 382, 291, 111 N.E. 1050, 1053, L.R.A. 1916 F, 696 (1916).

Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel today.

Whether other jurisdictions will follow the lead of New York is problematical, but almost any action after such long inaction would be welcome.

N. A. C.

TORTS–CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW

The final judgment in one of the few inharmonious decisions to come from the Supreme Court of Appeals of Virginia this year and one which reflects the consequences and inherent dangers of an appellate court sitting as reviewers of jury conclusions of fact, makes *Simmons* v. *Craig*[1] an important case to the practicing attorney in the negligence field.

Craig initiated an action in the Circuit Court of Roanoke County against Simmons for damages suffered in an automobile collision occasioned by the alleged negligence of Simmons who was driving at night without lights on his vehicle. Judgment was entered in the lower court in favor of Craig on the findings of the jury. On appeal, the Supreme Court of Appeals reversed the decision in favor of Simmons, two judges dissenting.

Two errors were of concern to the court in justification of the appeal; the two questions raised being:

1. Was Simmons guilty of any actionable negligence?
2. Was Craig guilty of contributory negligence as a matter of law?

One mile east of Vinton, Virginia, a collision occurred at a late twilight hour and during a heavy rainstorm. Simmons was driving westwardly toward town and Craig was following an unidentified motor vehicle going east on Route 24. Simmons' testimony placed his speed at 20 miles per hour while Craig claimed to have been travelling at a speed of 25 miles per hour just prior

[1] 199 Va. 338 (1957).