

March 1947

## Damages for Defamation by Radio

M. S. Marks

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Law Commons](#)

---

### Recommended Citation

M. S. Marks, *Damages for Defamation by Radio*, 25 Chi.-Kent L. Rev. 142 (1947).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol25/iss2/3>

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [dginsberg@kentlaw.iit.edu](mailto:dginsberg@kentlaw.iit.edu).

## NOTES AND COMMENTS.

### DAMAGES FOR DEFAMATION BY RADIO.

With a growing tendency on the part of more and more radio personalities to indulge in the practice of "ad-libbing," the legal problem posed in the case of *Locke v. Gibbons*<sup>1</sup> assumes greater importance. It had there been determined that as the alleged defamatory matter had been spoken into a microphone without the benefit of a written script the same constituted a slander, rather than a libel, so that in the absence of an allegation of special damage, no cause of action had been stated in view of the fact that the alleged defamatory matter was not slanderous *per se*.<sup>2</sup> Had the same been treated as a libel, judgment for at least nominal damages would have been required.<sup>3</sup> The reason underlying any such distinction rests purely on historical accident,<sup>4</sup> has not passed uncondemned,<sup>5</sup> and now seems wholly illogical when applied to cases of defamation occurring during a radio broadcast.

A system of jurisprudence which provides for so strict an adherence to the past for the determination of novel situations like the one presented in the *Locke* case can only lead to unjust and inequitable judgments. Many have commented on the fact that the complexities of our present machine age cannot wisely be settled, in a scientific era, by principles formulated long before such developments as the radio were conceived or envisaged. Thus Gmelin asserts: "It follows that the essential element in the administration of justice is to be sought in a place different from that in which it has been looked for in the past. The very kernel of the work of the judiciary lies in the just government of the real interests and possessions of human beings. The scholastic and dialectical

<sup>1</sup> 164 Misc. 877, 299 N. Y. S. 188 (1937), affirmed without opinion in 253 App. Div. 887, 2 N. Y. S. (2d) 1015 (1938). In the companion case of *Locke v. Benton & Bowles, Inc.*, 165 Misc. 631, 1 N. Y. S. (2d) 240 (1937), a motion to dismiss the complaint had been denied but that order was reversed, 253 App. Div. 369, 2 N. Y. S. (2d) 150 (1938), on the ground that the pleader should provide a contrast between the script as written and the actual broadcast presented.

<sup>2</sup> *Pollard v. Lyon*, 91 U. S. 225, 23 L. Ed. 308 (1876); *Marion v. Davis*, 217 Ala. 16, 114 So. 357 (1927).

<sup>3</sup> *Jones v. Register & Leader Co.*, 177 Iowa 144, 158 N. W. 571 (1916).

<sup>4</sup> See Restatement, Torts, §568, historical note, and *Jones v. Jones*, [1916] 2 A. C. 481 at 489.

<sup>5</sup> Lord Mansfield, in *Thorley v. Lord Kerry*, 4 Taunt. 355 at 365, 128 Eng. Rep. 367 at 371 (1812), noted that "an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed, or a private letter: it is true that a newspaper may be very generally read but that is all casual." His statement would seem much stronger if the words were spoken into a microphone.

method prevailing today, attempting as it does to draw the decision as a logical conclusion from the legal rule, by means of verbal interpretation supplemented by purely verbal inferences, without proper weighing of conflicting interests and without considering whether the result will be reasonable or not, is decidedly wrong. Unless we realize that it is the business of courts to serve the interests of actual life and to adapt their judgments to them, instead of forcing the facts into a bed of Procrustes according to some schematic formula, we are on the wrong road, and we shall err fatally in imagining that we can ever obtain certainty of law in this manner."<sup>6</sup> Dean Pound has pointed out that the real danger to the "administration of justice according to law is in timid resistance to rational improvement and obstinate persistence in legal paths which have become impossible in the heterogeneous, urban, industrial America of today."<sup>7</sup> Justice Holmes once expressed his contempt for superannuated archaic precedents by stating: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."<sup>8</sup>

While some hold to the view that the rule of stare decisis requires strict and immutable adherence to earlier precedents<sup>9</sup> because such an attitude gives permanency to the law, they overlook the fact that it deprives the law of adaptability to meet changing conditions. The better view would seem to be that precedent may serve as a strong formative influence without establishing a rigid pattern to which all future cases must strictly conform. As the legally operative factors in a rule of law change, the rule should change with them and courts have felt free to depart from the common law whenever they have found that precedent was wrongly decided<sup>10</sup> or when less mischief would come from reversal than from the perpetuation of outmoded ideas.<sup>11</sup> It is true that judges, reluctant to overrule existing law, often render lip-service to the status

<sup>6</sup> Johann Georg Gmelin, *Science of Legal Methods*, Modern Legal Philosophy Series, Vol. IX, pp. 123-4.

<sup>7</sup> Pound, *The Spirit of the Common Law* (Marshall Jones Co., Boston, 1921), p. xii.

<sup>8</sup> Holmes, *Collected Legal Papers* (Harcourt, Brace & Howe, New York, 1920), p. 187.

<sup>9</sup> Salmond, *Science of Legal Method*, Modern Legal Philosophy Series, Vol. IX, p. lxxxiii, for example, indicates that a judge "is bound by the decisions of his predecessors, not because they were necessarily or even presumably wiser than he is—not because their decisions are necessarily or presumably more correct than those at which he would himself arrive—but because it is in the public interest that questions once decided should remain decided."

<sup>10</sup> Hicks, *Materials and Methods of Legal Research* (Lawyers Co-operative Pub. Co., Rochester, New York, 1923), p. 85.

<sup>11</sup> Cooley, *Const. Lim.*, 8th Ed., pp. 108-24.

quo,<sup>12</sup> but recent decisions do tend to reveal a willingness on the part of the judiciary to disregard precedents, frankly and on other factors than those implicit in a system of common law.<sup>13</sup> One is, then, confounded to note the court, in the Locke case, stating that courts "cannot legislate to eradicate the long established distinction between libel and slander,"<sup>14</sup> particularly when that distinction becomes faced with a new technique in defamation.

The subject of radio defamation is not so new that it has not received some attention. In *Summit Hotel Company v. National Broadcasting Company*,<sup>15</sup> the court acknowledged the special characteristics thereof by saying: "Publication by radio has physical aspects entirely different from those attending the publication of a libel or a slander as the law understands them. The danger of attempting to apply the fixed principles of law governing either libel or slander to this new medium of communication is obvious. But the law is not so firmly and rigidly cast that it is incapable of meeting a new wrong as the demands of progress and change require."<sup>16</sup> Judge Otis, in *Coffey v. Midland Broadcasting Company*,<sup>17</sup> likewise noted a difference between the utterance of the natural voice and its electrical transmission. He said: "I conceive there is a close analogy between such a situation and the publication in a newspaper . . . The latter prints the libel on paper and broadcasts it to the reading world. The owner of a radio station 'prints' the libel on a different medium just as widely or even more widely 'read.'"<sup>18</sup> Some authors would call such conduct libel;<sup>19</sup> others would abolish any dis-

<sup>12</sup> For example, the idea of the sanctity of the seal was riddled with exceptions and distinctions before it was reduced to a mere shadow. Judges have coined the phrase "instinct with an obligation" to support certain contracts which, according to their terms, only bound one side: *Wood v. Duff Gordon*, 222 N. Y. 88, 118 N. E. 214 (1917). They have resorted to a "technical trespass" to permit recovery for damage from falling debris caused by blasting without negligence: *Hay v. The Cohoes Co.*, 2 N. Y. 159 (1848). Other illustrations will, no doubt, come readily to mind.

<sup>13</sup> In *Hermitage v. Goldfogle*, 204 App. Div. 710, 199 N. Y. S. 382 (1923), affirmed in 236 N. Y. 553, 142 N. E. 281 (1923), tax exemption on new construction built to alleviate intolerable housing conditions was justified on sociological, rather than legal, grounds. The opinion of Bijur, J., in *Farmers' Loan & Trust Co. v. Pierson*, 130 Misc. 110, 222 N. Y. S. 532 (1927), limits the latitude found in the corporate entity theory by reference to "justice" and "fairness" rather than to legal syllogisms.

<sup>14</sup> 164 Misc. 877 at 880, 299 N. Y. S. 188 at 192.

<sup>15</sup> 336 Pa. 182, 8 A. (2d) 302 (1939).

<sup>16</sup> 336 Pa. 182 at 200, 8 A. (2d) 302 at 310.

<sup>17</sup> 8 F. Supp. 889 (1934).

<sup>18</sup> 8 F. Supp. 889 at 890.

<sup>19</sup> Zollman, *Law of the Air* (Bruce Publishing Company, Milwaukee, Wis., 1927), p. 125; Seelman, *The Law of Libel and Slander in New York* (J. B. Lyon Company, Albany, New York, 1933), p. 3; Vold, *The Basis for Liability for Defamation by Radio*, 19 Minn. L. Rev. 611 (1935).

inction between libel and slander.<sup>20</sup> At least three states have recognized that if the defamatory words spoken over the radio are read from a prepared script they are to be treated as libelous in nature,<sup>21</sup> although it may be said that precedent supports this view.<sup>22</sup> One is led to inquire how the radio audience is to know whether the matter being spoken is being read or recited from memory,<sup>23</sup> but the courts seem to have made some point over the distinction.

If distinction must still be drawn between libel and slander, it would seem that scientific developments dictate that the division should be between the manner of projection, whether simply oral or by mechanical impulse, rather than whether the defamation reaches the general public through the aural or the optic nerves. It is true that inventions have increased and improved the facility of circulating written or printed matter, but such progress is trivial compared to the potency bestowed upon the spoken word operating through mechanical devices for, through them, the defamation may not only be transmitted over the greater part of the earth in a moment of time but may be simultaneously fashioned into permanent form. Such verbal puissance did not exist when the courts first distinguished speech from writing or print. Any suggestion that such phenomena might some day be possible would have been ridiculed as beyond the realm of even the weird and fanciful. Yet it is now an accomplished scientific fact.

The existence of a distinction between the natural voice and the broadcasted one was noted by Justice Brandeis, in *Buck v. Jewell-LaSalle Realty Company*,<sup>24</sup> where he said: "We are satisfied that the reception of a radio broadcast and its translation into audible sound is not a mere audition of the original program. It is essentially a reproduction. As to the general theory of radio transmission there is no disagreement. All sounds consist of waves of relatively low frequencies which ordinarily pass through the air and are locally audible. Thus music played at a distant broadcasting studio is not directly heard at the receiving

<sup>20</sup> Veeder, *The History and Theory of the Law of Defamation*, 4 Col. L. Rev. 33 (1904).

<sup>21</sup> *Sorensen v. Wood*, 123 Neb. 348, 243 N. W. 82 (1932); *Hartmann v. Winchell*, 187 Misc. 54, 63 N. Y. S. (2d) 225 (1946); *Hryhorijiv v. Winchell*, 180 Misc. 575, 45 N. Y. S. (2d) 31 (1943). See also *Polakoff v. Hill*, 261 App. Div. 777, 27 N. Y. S. (2d) 142 (1941); *Weglein v. Golder*, 317 Pa. 437, 177 A. 47 (1935); *Restatement, Torts*, § 568. The Restatement does not purport to lay down any definite rule as to extemporaneous remarks. See criticism by Farnum, *Radio Defamation and the American Law Institute*, 16 Bost. L. Rev. 1 (1936).

<sup>22</sup> Reading written defamatory matter aloud has been treated as libel in *M'Coombs v. Tuttle*, 5 Ind. (5 Blackf.) 431 (1840); *Snyder v. Andrews*, 6 Barb. (N. Y.) 43 (1849); *Adams v. Lawson*, 58 Va. (17 Grat.) 250 (1867).

<sup>23</sup> See *Irwin v. Ashurst*, 158 Ore. 61, 74 P. (2d) 1127 (1938).

<sup>24</sup> 283 U. S. 191, 51 S. Ct. 410, 75 L. Ed. 971 (1931).

set. In the microphone of the radio transmitter the sound waves are used to modulate electrical currents of relatively high frequencies which are broadcast through an entirely different medium, conventionally known as the 'ether.' These radio waves are not audible. In the receiving set they are rectified; that is, converted into direct currents which activate the loud speaker to produce again in the air sound waves of audible frequency. The modulation of the radio waves in the transmitting apparatus, by the audible sound waves is comparable to the manner in which the wax phonograph record is impressed by these same waves through the medium of a recording stylus."<sup>25</sup> As the voice of the speaker does not travel the airways but merely sets a mechanism into action permitting an electrical product to be disseminated, the broadcast is the product of voice and electrical radiation combined. The voice alone could no more be called the source of defamation than could the finger which presses the trigger be called the source of the bullet which kills.

Should not the courts, then, attach different legal consequences to defamation spread completely by the pure natural voice as contrasted with that which is spread through an instrument activated by the human voice but made more dangerous by the tremendous potentialities thereby created? To hold that direct address to a present audience is legally the same as a radio broadcast is as preposterous as to assert that holding a lighted match in the ordinary atmosphere is the equivalent of placing it into a gas chamber! Seelman, who would allow application of the rule as to general damages to defamation in the course of a radio broadcast by reason of its resemblance to libel, states: "The widest circulation of the greatest newspaper is insignificant when compared to the audience of a national broadcast. The speaker over the radio often prepares his speech and submits it to the broadcasting authorities. Technically it is then published as a libel; but when he speaks, it is the voice which scatters his words to millions. He speaks with prepared deliberation; and to a vast, if an uncountable, audience. To them his words are still unrecorded. Even here, the words, eagerly awaited with radio acquisitiveness, may leave a record as permanent as if the eye had seen the printed page. The rules of libel and not slander should here apply."<sup>26</sup>

He might have noted, bearing on the extensive character of the damage that is likely to follow, that spoken defamation may be less deleterious if limited to the locality of its utterance but that it bears inherent characteristics which can make it more damaging than print if given an identical sphere of publication with the latter. Modulation and inflection of speech carry more conviction than cold print. The chance of mis-

<sup>25</sup> 283 U. S. 191 at 199-200, 51 S. Ct. 410. 75 L. Ed. 971 at 977. Notes omitted.

<sup>26</sup> Seelman, *op. cit.*, p. 3.

quotation is multiplied, for the very fact that writing has a physical existence makes misquotation less likely. Pope well knew how speech might be distorted when he wrote:

“The flying rumours gathered as they rolled  
 And all who told it added something new  
 And all who heard it made enlargement too  
 In every ear it spreads, on every tongue it grew . . .”<sup>27</sup>

The courts can hardly be less aware of the danger inherent in a wide dissemination of defamatory matter of that character.

Other elements may serve to justify the classification of defamatory radio broadcasts with other forms of libel. While slander involves no other conduct than the act of speaking, except perhaps for an accompanying gesture, a series of acts must precede the publication of a libel. So, too, in radio. The actual defamation by speaking into a microphone requires the setting up of the device, connecting it with the means of transmission, and the actual operation and control thereof during the course of transmission. These acts may be nondefamatory in themselves but, when coupled with the actual speaking, partake of its character and make the entire performance into one composite act.<sup>28</sup> Certainly, if a simultaneous recording of the broadcast is made an even stronger resemblance to libel is presented.<sup>29</sup> True the oral utterance precedes the recording into permanent form, but there is no factual difference of sufficient merit to require a different legal result for it was intimated, in *Ostrowe v. Lee*,<sup>30</sup> that placing defamation in permanent form contemporaneously with its oral publication is a libel.<sup>31</sup>

Enough has probably been said to show that the law is unrealistic if it persists in treating defamation over the radio as a species of slander.

<sup>27</sup> Pope, *The Temple of Fame*, p. 463.

<sup>28</sup> Vold, *The Basis for Liability for Defamation by Radio*, 19 *Minn. L. Rev.* 611 at 640-1 (1935), suggests that attempts to classify defamation by radio “on principle” as constituting slander are hopelessly erroneous. He states: “Radio transmission in that case, as in every other case, takes place through active operations by the broadcaster which manifestly constitute ‘conduct’ on his part rather than mere speech. Unless the term ‘slander’ is to be so enlarged as to cover not only oral speech but defamation by conduct as well, the facts of radio transmission of defamatory utterances do not fall within it. On the other hand, defamation by conduct has ordinarily by the authorities been held equivalent to libel.”

<sup>29</sup> Defamation written in disappearing ink or spread in the sky by smoke from an airplane would be treated as libel, even though the script be of evanescent character. The recording of a broadcast, available for use on other occasions without further conduct, is far more permanent than these.

<sup>30</sup> 256 N. Y. 36, 175 N. E. 505 (1931).

<sup>31</sup> In that case, dictation to a stenographer of defamatory matter was regarded as libelous upon a rereading thereof by the stenographer as the notes were examined and transcribed. Should a distinction be made if the stenographer finds it unnecessary to transcribe her notes?

What attitude, then, should the law take? In some states, legislation has been enacted treating such conduct as criminal but without attempting to classify it<sup>32</sup> or putting it in the class of criminal libel.<sup>33</sup> In other states, legislation has been designed to limit the liability of the operator of the radio station but uses either the term "libel" or the term "slander" without discrimination;<sup>34</sup> evidencing some confusion in the minds of legislators. None of these statutes purport to settle the civil problems with respect to the nature of the tort or the measure of damage. Settlement thereof has been left, so far, to the courts. Are they firm enough to sweep away established doctrines not in accord with scientific developments; doctrines which shackle by the dead weight of precedent?

Many may urge that courts cannot legislate to eradicate established law, but they may be answered, at least in this respect, by a quotation from Francois Geny. He wrote: "Whenever it is the business of a judge to discover what the law is in fields in which it has not yet been formulated, his functions have an appearance analogous to that of the legislator himself . . . the considerations that must guide the judge in accordance with the end to be attained are exactly the same as those which would influence the legislator. For the one as well as the other aims at promoting by an appropriate rule the ends of justice and social utility . . . when the formal sources are silent or insufficient . . . he should formulate his decision in accordance with the same considerations which the legislator would have in mind if he were to prescribe rules relating to the question at issue."<sup>35</sup> That courts have done so many times in the past is beyond dispute, for even the very law of defamation is judge-made.

It would be useless to trace the steps by which the doctrine of stare decisis, at one time, obtained so strong a hold on our law and made the "sacredness of precedent" a template of justice,<sup>36</sup> or to follow the development of the strict division of powers of government among the three co-ordinate branches.<sup>37</sup> The fact is that such ideas no longer hold

<sup>32</sup> Deering, Cal. Penal Code, § 258; Ill. Rev. Stat. 1945, Ch. 126, § 4; Ore. Comp. Laws Ann., § 23.437.

<sup>33</sup> Remington, Wash. Rev. Stat. Ann., Vol. 4, § 2424 supp.

<sup>34</sup> Fla. Stat. 1941, Ch. 770.03; Burns, Ind. Stat. 1933, 1943 supp. § 2.518; Iowa Code 1946, Ch. 659.5; Rev. Code Mont., 1939 supp., Ch. 3A, § 5694.1.

<sup>35</sup> Geny, Science of Legal Method, Modern Legal Philosophy Series, Vol. IX, pp. 4-5.

<sup>36</sup> See Pollock and Maitland, Hist. Eng. Law, 2d Ed., Vol. 1, pp. 203-6.

<sup>37</sup> Cohen, Law and the Social Order (Harcourt, Brace & Co., New York, 1933), p. 115, notes the fact that no such strict division exists today.

true for, if they did, social progress would be immobilized.<sup>38</sup> Because the courts, at one time, held that oral defamation, if not slanderous *per se*, was actionable only if special damage could be shown is no reason to forever impose such a limitation. As courts once were willing to recognize the more serious consequences that flowed from giving the defamatory matter permanence and wider dissemination, so they should now recognize the more serious dangers flowing from an improper use of a new method of transmitting ideas. The question should not be was a voice involved but rather, is this type of disparagement a new method of spreading defamation calling for new and more stringent punishment?

M. S. MARKS.

<sup>38</sup> Frank, *Law and the Modern Mind* (Brentano, New York, 1930), pp. 6-7, indicates how, when human relationships are transforming daily, "legal relationships cannot be expressed in enduring form. The constant development of unprecedented problems requires a legal system capable of fluidity and pliancy . . . although changes cannot be made lightly, yet law must be more or less impermanent, experimental and therefore not nicely calculable. Much of the uncertainty of law is not an unfortunate accident: it is of immense social value."