

4-1-1957

## Defamation via Television Ad Lib; Libel and Slander Distinctions

Harold M. Halpern

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Torts Commons](#)

---

### Recommended Citation

Harold M. Halpern, *Defamation via Television Ad Lib; Libel and Slander Distinctions*, 6 Buff. L. Rev. 325 (1957).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol6/iss3/10>

This Comment is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact [law scholar@buffalo.edu](mailto:law scholar@buffalo.edu).

## NOTES AND COMMENTS

on the statute which would create litigation? This is not another attempt to eliminate litigation where it will vindicate just causes; but it is an attempt to render justice where it is due. It would seem that spouses who need this kind of insurance coverage should be required to obtain a policy which has an express provision relating thereto.

Richard F. Griffin

### NOTE: DEFAMATION VIA TELEVISION AD LIB; LIBEL AND SLANDER DISTINCTIONS

On a motion to dismiss a complaint alleging a cause of action in libel for a television commentator's ad lib. Held: Motion denied; a telecast of defamatory matter not read from a prepared script constitutes libel and not slander. *Sbor v. Billingsley*.<sup>1</sup>

Defamation consists of the torts of libel and slander, libel, generally speaking, being publication by written or printed words of unprivileged, false and defamatory matter, while slander is publication of the above matter by spoken words.<sup>2</sup> Libel is actionable without proof of damages,<sup>3</sup> while slander is actionable only if there is proof of special damages,<sup>4</sup> viz: a pecuniary loss,<sup>5</sup> unless the defamation is within the narrow category known as slander per se. Imputation of unchastity to a woman,<sup>6</sup> imputation of an indictable offense involving moral turpitude,<sup>7</sup> imputation of a loathsome disease,<sup>8</sup> and imputation affecting one in his trade, business or office,<sup>9</sup> are the only spoken words which are actionable per se.

*Snyder v. Andrews*<sup>10</sup> established the principle that a letter read in the presence of another is libel. Although criticized,<sup>11</sup> this holding has been followed.<sup>12</sup>

1. 158 N. Y. S. 2d 476 (Sup. Ct. 1957).

2. GAITLEY, LIBEL AND SLANDER IN CIVIL ACTION, 1 (2d ed. 1929); ODGERS, LIBEL AND SLANDER, 1 (6th ed. 1929); RESTATEMENT, TORTS §558, §568 (1) (2) (1938).

3. *Thorley and Lord Kerney*, 4 Taunt. 355, 128 Eng. Rep. 367 (1812); RESTATEMENT, TORTS §569 (1938).

4. E.g., *Torres v. Hunter*, 150 App. Div. 798, 135 N. Y. Supp. 332 (2d Dep't 1912).

5. E.g., *Beach v. Ranney*, 2 Hill 309 (N. Y. 1842); RESTATEMENT, TORTS, §575, comment b (1938).

6. E.g., *Biggerstov v. Zimmerman*, 108 Colo. 194, 114 P. 2d 1098; N. Y. R. CIV. PRAC. 97. *Contra, Barnett v. Phelps*, 97 Ore. 242, 191 Pac. 502 (1920).

7. E.g., *Brooker v. Coffin*, 5 Johns. 188 (N. Y. 1809).

8. E.g., *Williams v. Holdredge*, 22 Barb. 396 (N. Y. 1854).

9. E.g., *Rager v. McCloskey*, 305 N. Y. 75, 111 N. E. 2d 214 (1953).

10. 6 Barb. 43 (N. Y. 1849).

11. *Hartman v. Winchell*, 296 N. Y. 296, 300, 73 N. E. 2d 30, 32 (1947) (concurring opinion); *Osburn v. Thomas Boulter & Son*, [1930] 2 K. B. 226, 231, 236 (dictum); *Meldrum v. Australian Broadcasting Co.*, [1932] Vict. L. R. 425.

12. *Hartman v. Winchell*, 296 N. Y. 296, 73 N. E. 2d 30 (1947); *Bander v. Metropolitan Life Ins. Co.*, 313 Mass. 337, 47 N. E. 2d 595 (1943); *Peterson v. Western Union Telegraph Co.*, 72 Minn. 41, 74 N. W. 1022 (1898); RESTATEMENT, TORTS §568, comment e.

Based upon this determination, defamation by radio and television is held to be libel if read from a script.<sup>13</sup> However, such defamation has been held to be only slander if not read from a script.<sup>14</sup>

The historical explanation of the distinction between libel and slander based on form, that is, whether oral or written, is the amalgamation of the common law action of defamation and criminal libel of the Star Chamber proceedings of the 16th and 17th centuries where the wrong was the writing itself.<sup>15</sup> The present justification for this distinction is based on the grounds that that which is written shows greater malice and is capable of greater mischief because it is more durable and is therefore capable of greater dissemination.<sup>16</sup> Because television and radio reach millions of people, some courts have intimated that defamation by the relatively new media is a new tort, similar to libel in mischief because of the area of dissemination, and similar to slander in its form.<sup>17</sup> From this intimation writers have suggested that because, with respect to mischief, radio defamation is similar to libel, it should be governed by the rules of libel, that is actionable per se, whether or not read from a script.<sup>18</sup> It has also been proposed that defamation by radio is really conduct because a voice is heard, not automatically, but only through mechanical operations of radio technicians.<sup>19</sup> From this, it has been concluded that radio defamation, similar to other defamatory conduct,<sup>20</sup> is libel—slander being restricted to defamation by unassisted oral speech.

Whenever radio defamation is held to be actionable without proof of a pecuniary loss, no matter what formal reasoning is used, it is this writer's opinion that strongly influencing this decision is the factor of the large area of dissemin-

13. *Hartman v. Winchell*, *supra* note 12 (radio); *Sorenson v. Wood*, 123 Neb. 348, 243 N. W. 82 (1932) (radio); *Landau v. Columbia Broadcasting System*, 205 Misc. 357, 128 N. Y. S. 2d 254 (Sup. Ct. 1954) (television); RESTATEMENT, TORTS §568, comment f (1938) (radio). *Contra*, *Meldrum v. Australian Broadcasting Co.*, *supra* note 11. (defamation by radio, read from a script held to be slander).

14. *Remington v. Bentley*, 88 F. Supp. 166 (S. D. N. Y. 1949) (television); *Locke v. Gibbons*, 164 Misc. 877, 299 N. Y. Supp. 188 (Sup. Ct. 1937) *aff'd*, 253 App. Div. 887, 2 N. Y. S. 2d 1015 (1st Dep't 1938) (radio).

15. *De Libellis Famosis*, 5 Co. Rep. 125, a, 77 Eng. Rep. 250 (1609); *Edwards v. Wooten*, 12 Co. Rep. 35, 77 Eng. Rep. 1316, 1317 (1655). For the history, see Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903), 4 COLUM. L. REV. 33 (1904); RESTATEMENT, TORTS §568, comment b (1938).

16. *Pollard v. Lyons*, 91 U. S. 225, 235 (1875); *Ostrowe v. Lee*, 256 N. Y. 36, 39, 175 N. E. 505, 506 (1931) ("... [T]he sting to writing is its permanence of form").

17. *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 43, 8 A. 2d 302, 310 (1939); *Irwin v. Ashurst*, 158 Ore. 61, 74 P. 2d 1127 (1938); *Kelley v. Hoffman*, 137 N. J. L. 695, 61 A. 2d 143, 145 (1948).

18. Comment, 12 ORE. L. REV. 149 (1932); comment, 17 ORE. L. REV. 314 (1937).

19. Vold, *The Basis for Liability for Defamation by Radio*, 19 MINN. L. REV. 611, 639 (1935).

20. Vold, *op. cit. supra* note 19 at 641 n. 88. (*E.g.*, motion pictures, effigy, signs, pictures).

ation.<sup>21</sup> To state that radio defamation is conduct and therefore is libel is either an error—because libel is based not on the grounds that it is conduct, but rather because there is, unlike the spoken work, a form which is capable of performance<sup>22</sup>—or is too technical a ground upon which to rest. To state that radio defamation is a new tort is a fiction. Radio and television are only new methods of disseminating defamatory matter which if held to be slander point to the conclusion that,

“ . . . the law of defamation . . . is as a whole absurd in theory and very often mischievous in its practical operation.”<sup>23</sup>

The foundation of the action of defamation whether libel or slander is in the injury done to reputation in the estimation of others.<sup>24</sup> Therefore, to say that one may recover if the defamation is read from a script, even though unknown to the listener, but may not recover if an ad lib, is unrealistic.<sup>25</sup> The reasons given for the distinction between libel and slander—greater malice and greater injury to reputation because of permanence—are not necessarily true. It does not always follow that because something is permanent, it ipso facto has greater circulation and therefore causes greater injury, for often times spoken words reach more people than does a confidential letter. Nor is it always true that that which is written shows greater malice, the theory being that a person thinks before writing, while he speaks spontaneously without thought. In any event, malice is not essential to liability in the first instance.<sup>26</sup> Even if the reasons used in justification are valid, they should not go to whether one has a cause of action—whether one may recover at all for injury—but only to the extent of the injury to one's reputation and how much he may recover.<sup>27</sup>

The distinction between libel and slander is based solely on form, that is, whether the defamation is something which is capable of permanence. Defamation via radio and television adds strength to the criticism of the distinction last noted, but does not invoke any new substantive arguments. This writer believes that if defamation by radio and television is to be libel, it is not to be justified by the

---

21. RESTATEMENT, TORTS §568 (3) (1938) recognizes that the area of dissemination is one criteria in determining whether a particular defamation is libel or slander.

22. The cases cited by Vold, *supra*, note 19, do not support his contention. *E.g.*, in *Monson v. Tussaud*, [1894] 1 Q. B. 671, 692, 63 L. J. Q. B. 454, it is said, “Libel . . . may be conveyed in some . . . permanent form. For instance, a statute, a caricature, an effigy . . . or pictures.” (Emphasis added). Also see rationale of cases cited in note 16 *supra*.

23. Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903).

24. *Broderick v. James*, 3 Daly 481 (N. Y. 1871).

25. Cf. *Hartman v. Winchell*, 296 N. Y. 296, 300, 73 N. E. 2d 30, 32 (1947) (concurring opinion).

26. *Bryam v. Collins*, 111 N. Y. 143, 19 N. E. 75 (1888); *Bromage v. Prosser*, 4 B. & C. 247, 107 Eng. Rep. 1051 (1825).

27. See Veeder, *op. cit. supra* note 23 at 571-73.

continuation of the fiction that the reading from a script is in itself actionable—thus not actionable per se if not read from a script—or by the creation of a new fiction, by establishing a new tort. Rather, the defamation should be held libel because of the great capacity it has to harm one's reputation. It is possible however, that the courts may hold that defamation by radio and television is libel whether or not read from a script and at the same time maintain the existing distinction if the program is kinescoped as it apparently was in the instant case. This is not to be confused with the showing of the kinescoped program itself, which would clearly be libel.<sup>28</sup> Rather, it might be said that the requirement of permanence is met by the simultaneous kinescoping, it being immaterial that the viewer was not aware that the defamatory matter was made permanent.<sup>29</sup> In this case, the court reached its holding by frankly recognizing that because of its great capacity to cause harm, that at least in mass media communication, the distinction based on form should not be controlling, in order that one may recover damages for the injury done to his reputation without proof of a pecuniary loss.<sup>30</sup>

*Harold M. Halpern*

---

28. By analogy to *Brown v. Paramount Publix Corp.*, 240 App. Div. 520, 270 N. Y. Supp. 544 (3d Dep't 1934) and *Youssouppoff v. Metro-Goldwin-Mayer Pictures Ltd.*, 50 T. L. R. 581, 99 A. L. R. 864 (C. A. 1934), where the courts held that defamation by motion pictures is libel, the voice being ancillary to the picture, which is permanent.

29. The court's reasoning in *Hartman v. Winchell* 296 N. Y. 296, 73 N. E. 2d 30 (1947) that the writing itself need not be published as long as there is in fact a permanent form should be applicable to the situation where defamatory matter is published which at the same time is made permanent. This is to be distinguished from the situation where the embodiment in a permanent form follows publication of oral defamation.

30. *Cf. Hartman v. Winchell*, 296 N. Y. 296, 300, 73 N. E. 2d 30, 32 (1947) (concurring opinion).

# RECENT DECISIONS

## *Labor Law: Unfair Labor Practice Strikes During Taft-Hartley Act "Cooling-Off" Period*

Employees were discharged after engaging in a strike directed solely against employer unfair labor practices. Employer refused reinstatement on the grounds: (1) that the strike was in violation of a no-strike clause in the collective bargaining agreement; and, (2) that the strikers lost their employee status under section 8(d) of the Taft-Hartley Act, 61 STAT. 142 (1947), 29 U. S. C. §158(d) (1952), because the strike occurred during the sixty-day "cooling off" period required by that section. In a proceeding for enforcement of a NLRB order directing reinstatement of these employees, held (6-3): neither the no-strike clause of the agreement nor the loss of status provision of the statute is applicable to strikes solely against employer unfair labor practices, and the NLRB had power to order reinstatement. *Mastro Plastics Corp. v. NLRB*, 350 U. S. 270 (1956).

The Court was unanimous in construing the no-strike clause as applicable only to economic strikes, since the agreement, taken as a whole, dealt solely with the economic relationship between employer and employee. They refused to find that the employees had given up their most effective weapon against employer interference with their rights, without clear and compelling language in the agreement to support such an interpretation.

Even if a breach of contract had been found, a like result could have been reached by application of the principle that a strike in breach of contract is not grounds for employer's refusal to reinstate where the employer's actions causing the strike were inconsistent with the purpose of the contract. *United Biscuit Co.*, 38 N. L. R. B. 778 (1942), *enforcement granted*, 128 F. 2d 771 (7th Cir. 1942). However, the Court's view appears preferable as precedent for interpretation of such strike waiver agreements. While no-strike agreements covering economic conditions are valuable implements of peaceful labor settlements, unions can hardly be expected to give up the strike weapon as a counter-measure to employer unfair practices, without exacting comparable employer concessions. Hence, a strict interpretation of such agreements will encourage their continued use. The view adopted by the Court supports current NLRB policy.

Although the legal right to strike is traced back to the early case of *Commonwealth v. Hunt*, 4 Met. 111 (Mass. 1842), the concomitant right of employees to waive their strike right by proper bargaining agreements has never been questioned. This is so because of the public policy favoring peaceful settlement of labor disputes. In furtherance of this policy, the NLRB formulated the doctrine that strikes in breach of such agreements are not protected activity under the NLRA. *Joseph Dyson & Sons Inc.*, 72 N. L. R. B. 445 (1947); *Scullin*