

July 2013

Libel and Slander--Defamatory Radio Broadcast Read from Script Constitutes Libel, Not Merely Slander (Hartman v. Winchell, 296 N.Y. 296 (1947))

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

St. John's Law Review (1947) "Libel and Slander--Defamatory Radio Broadcast Read from Script Constitutes Libel, Not Merely Slander (Hartman v. Winchell, 296 N.Y. 296 (1947))," *St. John's Law Review*. Vol. 22 : No. 1 , Article 16.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol22/iss1/16>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

the business is unlawful if carried on within the jurisdiction of the State of California and that issue was decided by the Supreme Court of that state. In the *Heiminger* case the court acknowledged that Section 23(a) of the Internal Revenue Code⁸ does not expressly state that the business must be lawful for the deduction to apply but also acknowledges that the language of Section 23(a) has been, from time to time, narrowly construed by the courts, "in order that tax deduction consequences might not frustrate sharply defined national or state policies prescribing particular types of conduct."

The Tax Court ruled that to permit those deductions, incurred in an effort to perpetrate an illegal gambling business, would be contrary to public policy.

The expenditures made to the attorney in Washington are disallowed on the authority of *Textile Mills Securities Corporation v. Commissioner*⁹ wherein expenses incurred "for certain types of lobbying and political pressure with a view to influencing federal legislation" was denied.

The deduction claimed for "Public Relations" failed for lack of proof of duties which were performed, the court indicating that if such proof had been made the deductions would probably have fallen under the *Textile Mills* case *supra*.

Other deductions claimed by Rex Operators and by the individual taxpayers were disallowed. Considerations of space preclude treatment of them in this article.

W. J. H.

LIBEL AND SLANDER — DEFAMATORY RADIO BROADCAST READ FROM SCRIPT CONSTITUTES LIBEL, NOT MERELY SLANDER.—The defendant during a broadcast, uttered defamatory statements concerning the plaintiff. The words did not defame the plaintiff in his professional capacity and consequently were not slanderous *per se*. However, while making the defamatory remarks, the defendant read from a script prepared in advance of the broadcast. In the action the plaintiff alleged that the remarks were made while the defendant read from a script and further alleged the loss of his teaching and lecturing position with a subsequent loss to him of more than \$7,000. The defendant moved to dismiss the complaint upon the ground that it did not state facts sufficient to constitute a cause of action and that the general allegation that the plaintiff lost over \$7,000 as a result of defendant's remarks was not sufficiently specific to constitute an

⁸ INT. REV. CODE § 23(a) provides:

" . . . All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . may be deducted from gross income."

⁹ *Textile Mills Corp. v. Commissioner*, 314 U. S. 326, 86 L. ed. 249 (1942).

allegation of special damage. *Held*, motion to dismiss the complaint denied. The allegation that the remarks were read from a prepared script, even if not sufficient to compose what is commonly termed a libel, did state a good cause of action. In its opinion the court stated that the defendant's utterance was libel, not slander, following precedent in New York where reading defamatory matter contained in a letter in the presence of a stranger is deemed a sufficient publication to sustain an action for libel¹ and where reading defamatory matter from a script during a radio broadcast is held to be libel.² *Hartman v. Winchell*, 296 N. Y. 296, 73 N. E. 20 (1947).

Mr. Justice Fuld, concurring in the instant case, declares that the basis of liability for libel had its origin in two early seventeenth century English criminal cases in the Court of the Star Chamber. These actions were concerned with the prosecution for libel of certain ecclesiastics, the purpose being to aid the crown in repressing allegedly seditious speech.³ The broad rules of criminal liability are declared by Mr. Justice Fuld to be of uncertain validity when applied to the civil remedy developed at a later date, and that liability should be sought on the grounds that sound policy requires such a result.

The action of defamation at the common law in the sixteenth century embraced written as well as spoken words and the same rules were applicable to both.⁴ The cause of action was based on the damage sustained and not on the basis of the insult received.⁵ The courts were concerned with material rights and not discipline.⁶ For this very reason it was necessary to allege and prove special damages.⁷ This essential element was later relaxed in particular instances, as where a crime was imputed to an innocent party, and damages in those cases was presumed from the act itself.⁸

With the advent of the printing press, the Court of the Star Chamber assumed control over printed matter because the effect of defamation in the written form was to disturb the peace.⁹ The ac-

¹ *Snyder v. Andrews*, 6 Barb. 43 (N. Y. 1849).

² *Hryhorijiv v. Winchell*, 180 Misc. 574, 45 N. Y. S. 2d 31 (Sup. Ct. 1943), *aff'd*, 267 App. Div. 817, 47 N. Y. S. 2d 102 (1st Dep't 1944).

³ *Di Libellis Famosis*, 5 Co. Rep. 125a, 77 Eng. Rep. 250 (K. B. 1605); *John Lamb's Case*, 9 Co. Rep. 59b, 77 Eng. Rep. 822 (K. B. 1610).

⁴ *Broughton's Case*, Moore 141, 72 Eng. Rep. 493 (K. B. 1583); *Ware v. Johnson*, 2 Lee 103, 161 Eng. Rep. 279 (P. & D. 1755); *Boughton v. Bishop*, 1 Anderson 119, 123 Eng. Rep. 385 (C. P. 1584).

⁵ 8 HOLDSWORTH, A HISTORY OF ENGLISH LAW 335, 365 (1926); 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 276, 278 (1906); 5 HOLDSWORTH, A HISTORY OF ENGLISH LAW 206 (1926).

⁶ See *Jones v. Jones*, [1916] 2 A. C. 481, 490; *Gallwey v. Marshall*, 9 Ex. 294, 300, 156 Eng. Rep. 126, 128 (Ex. 1853); *Veeder, The History and Theory of the Law of Defamation*, 3 COL. L. REV. 571, 573 (1903).

⁷ *Compagnon v. Martin*, 2 W. Bl. 790, 96 Eng. Rep. 465 (K. B. 1772).

⁸ 8 HOLDSWORTH, A HISTORY OF ENGLISH LAW 348 (1926); 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 276, 277, 278 (1906); see also *Jones v. Jones*, [1916] 2 A. C. 481, 490.

⁹ See *Jones v. Jones*, [1916] 2 A. C. 481, 489; 5 HOLDSWORTH, A HISTORY OF ENGLISH LAW 207, 208, 209 (1926).

tion for written defamation or libel, was a crime which carried with it, in addition, general damages.¹⁰ The common law courts adopted libel from the criminal libel of the Court of the Star Chamber which was abolished by the Long Parliament. The necessity of proof of special damages was dispensed with, and the writing itself made presumptive evidence of damage.¹¹ The courts having allowed certain actions in defamation to be maintained without proof of special damage, had placed upon themselves the burden of deciding whether the defamation was actionable *per se*. To relieve themselves in part of this burden, they chose to deem any writing a defamation *per se*.¹² At this time, too, dueling was a common and dangerous practice, and in order to deter it, the courts considered defamation in writing as presumptive of damage¹³ thus enticing the contestants away from the field of honor and into the courts. The distinction between written and non-written defamation was the product of policy¹⁴ and not the result of mere historical accident.¹⁵

Today various reasons are given for the distinction in form between libel and slander,¹⁶ primary among them being the greater capacity of libel for harm due to its wide range of dissemination consequent upon its permanence in form.¹⁷ This is not necessarily true, as is all too evident, but the distinction had been made as far back as the time of Charles II and has been recognized by the courts since the early eighteenth century.¹⁸ Later cases have held that the verbal exposition of the contents of a defamatory document is libel, at least where the audience is aware of the existence of the manuscript¹⁹ and even where no such knowledge exists.²⁰

¹⁰ See *Jones v. Jones*, [1916] 2 A. C. 481, 489; 5 HOLDSWORTH, A HISTORY OF ENGLISH LAW 212 (1926).

¹¹ Veeder, *The History and Theory of the Law of Defamation*, 3 COL. L. REV. 546, 568, 569 (1903); 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 292 (1906).

¹² *King v. Lake*, Hardres 470, 145 Eng. Rep. 552 (Ex. 1670).

¹³ 8 HOLDSWORTH, A HISTORY OF ENGLISH LAW 353 (1926); 5 HOLDSWORTH, A HISTORY OF ENGLISH LAW 199, 201 (1926).

¹⁴ See *Ostrowe v. Lee*, 256 N. Y. 36, 39, 175 N. E. 505, 506 (1931).

¹⁵ See *Ostrowe v. Lee*, 256 N. Y. 36, 39, 175 N. E. 505, 506 (1931); 8 HOLDSWORTH, A HISTORY OF ENGLISH LAW 365 (1926); 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 291, 292 (1906).

¹⁶ See *Pollard v. Lyon*, 91 U. S. 225, 235, 23 L. ed. 308, 310 (1875).

¹⁷ See *Ratcliffe v. Evans*, [1892] 2 Q. B. 524, 530; *Ostrowe v. Lee*, 256 N. Y. 36, 39, 175 N. E. 505, 506 (1931); ZOLLMAN, LAW OF THE AIR 125 (1927); Veeder, *The History and Theory of the Law of Defamation*, 3 COL. L. REV. 546, 571, 572 (1903); Vold, *The Basis for Liability for Defamation by Radio*, 19 MINN. L. REV. 611, 641 (1934-35).

¹⁸ *Thorley v. Lord Kerry*, 4 Taunt. 355, 128 Eng. Rep. 367 (C. P. 1812).

¹⁹ *Forrester v. Tyrrell*, 9 T. L. R. 257 (C. A. 1893); *Patching v. Howarth*, 4 D. L. R. 489 (1930); *Ostrowe v. Lee*, 256 N. Y. 36, 175 N. E. 505 (1931); *Lunn v. Littauer*, 187 App. Div. 808, 175 N. Y. Supp. 657 (3d Dep't 1919); *Block v. Nussbaum*, 160 App. Div. 678, 146 N. Y. Supp. 55 (1st Dep't 1914).

²⁰ *Johnson v. Hudson*, 7 Ad. & E. 233, 112 Eng. Rep. 459 (K. B. 1836).

The instant decision is in accord with the leading case outside New York, *Sorenson v. Wood*,²¹ where the language was held libelous because the speaker, while broadcasting, read his speech from a script. Similar decisions have held that reading defamatory matter aloud in the presence of others²² or over the radio²³ is libel. Similarly the Restatement²⁴ declares "A libel may be published by broadcasting over the air by means of a radio if the speaker reads from a prepared manuscript or speaks from written or printed notes or memorandum." The distinction has long been established and maintained although the original reasons for the distinction have been effaced and present efforts to supplant them with other reasons have proven inadequate. However, the decision here might possibly be sustained on other grounds, such as the original and fundamental reason for all defamation actions—damage.²⁵

The essence of libel is the capacity for damage.²⁶ For determining such, the court should look to the substance of the injury and not merely to the form. In modern times there are certain slanderous expressions which are actionable in themselves because the natural consequences of what they impute to another is damage²⁷ in addition to the damage presumed from the mere fact a defamation is in written form. "The area of dissemination, the deliberate and premeditated character of its publication and the persistence of the defamatory conduct are factors to be considered in determining whether a publication is libel rather than slander."²⁸ Logically the

²¹ *Sorenson v. Wood*, 123 Neb. 348, 243 N. W. 82 (1932).

²² *Ohio Public Service Co. v. Myers*, 54 Ohio App. 40, 6 N. E. 2d 29 (1934).

²³ *Weglein v. Golder*, 317 Pa. 437, 177 Atl. 47 (1935).

²⁴ RESTATEMENT, TORTS § 568(f) (1938).

²⁵ 8 HOLDSWORTH, A HISTORY OF ENGLISH LAW 335, 346 (1926); see *Thorley v. Lord Kerry*, 4 Taunt. 355, 364, 128 Eng. Rep. 367, 371 (C. P. 1812); *Jones v. Jones*, [1916] 2 A. C. 481, 500; *Foulger v. Newcomb*, L. R. 2 Ex. 327, 330 (1867).

²⁶ *De Crespigny v. Wellesley*, 5 Bing. 392, 130 Eng. Rep. 1112 (C. P. 1829); see also *Thorley v. Lord Kerry*, 4 Taunt. 355, 364, 128 Eng. Rep. 367, 371 (C. P. 1812).

²⁷ See *Pollard v. Lyon*, 91 U. S. 225, 226, 23 L. ed. 308, 310 (1875).
 ". . . (1) Words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. (2) Words falsely spoken of a person which impute that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society. (3) Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit, or the work of integrity in the discharge of the duties of such an office or employment. (4) Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade. (5) Defamatory words falsely spoken of a person, which, though not in themselves actionable, occasion the party special damage. . . ."

In New York, RULES OF CIVIL PRACTICE, Rule 97: "In an action of slander brought by a woman for words imputing unchastity to her, it is not necessary to allege or prove special damages."

²⁸ RESTATEMENT, TORTS § 568(3) (1938).

broadcast of a defamatory remark would seem to be as potentially harmful as a mere publication contained in a writing, or as not less in capacity for damage than the classifications of slander for which no special damage need be proved. Logic and policy, as enunciated by Mr. Justice Fuld, point to the conclusion that defamation by radio should be actionable *per se*, eliminating the difficult problem which confronts courts where the defamation is the result of a broadcast.²⁹

A. J. S.

PROPERTY IN IDEAS—ORIGINAL AND CONCRETE—CONTRACT, EXPRESS OR IMPLIED.—This is an action for damages based upon a breach of a contract by which plaintiff agreed to disclose his process for manufacturing laminated canvas soles, and to instruct defendant in the use of said process. Defendant agreed to pay plaintiff 10% of the selling price realized from the sales of such soles. Thereafter the process was adopted and used by defendant in manufacturing that type of sole, but the defendant nevertheless has neglected and refused to remunerate plaintiff at the stipulated rate, prompting him to institute this action. The defense interposed, *inter alia*, is that plaintiff is not entitled to recover because the process was not new or novel; and that no one can have a proprietary interest in ideas well known to others. *Held*, judgment for plaintiff affirmed. The recovery is justified on the theory that plaintiff did have a property right in the formula which he disclosed to defendant as the subject matter of their agreement. *Schonwald v. Burkart Manufacturing Co.*, — Mo. —, 202 S. W. 2d 7 (1947).

The court reasoned that, just as ownership of wild animals depends entirely upon keeping them in captivity, so too does ownership of ideas ordinarily depend on non-disclosure. And as the ownership of a beast terminates with its escape,¹ in like manner ownership of an idea ends by disclosure. However, when ideas are embodied in a concrete plan for accomplishing a desired result, the one who conceived the plan has a right to contract with reference to its disclosure, even though he did not originate it in the sense that no one else ever had similar ideas. This case does not turn on an unauthorized use of an asserted property right in a disclosed idea, but rather on a promise to pay for its authorized use.

As a general proposition, in the absence of an express agreement, the originator or proprietor of an abstract idea which cannot be sold, appropriated or used without disclosure, cannot hold liable one who

²⁹ SEELMAN, THE LAW OF LIBEL AND SLANDER IN THE STATE OF NEW YORK 3 (1933).

¹ Fleet v. Hegeman, 14 Wend. 42, 43 (N. Y. 1835).