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cluded. The Commission strongly urges that guilt and punishment be treated separately[55] because they feel that oftentimes a jury will agree that the defendant is guilty of first-degree murder, but individual members of the jury will disagree as to whether the defendant is deserving of death. This, they suggest, results in an influencing of the eventual verdict and hence the consequent verdict is not expressive of what the jurors truly believe the facts establish. It seems reasonable to assume that individual treatment of guilt and punishment will reduce considerably any obstruction of true fact-finding which the present system of dual consideration may produce.

Conclusion

Since it is clear that the most recent data are far from conclusive as to the beneficial consequences of abolition, and since there exists considerable dispute regarding a binding moral standard which must be adhered to, it appears that the most reasonable and cautious approach is not complete abolition but the wise application of a discretionary death penalty. The Commission's proposed bill is, in some respects, almost revolutionary and yet, upon a sober deliberation of all the statistics and contentions, it seems the most practicable solution to an age-old problem.

[55] *Id.* at 7.

Recent Decision: Defamatory Broadcast — New Cause of Action

With the advent of commercial radio and television, novel factual situations in the area of defamation have been created by both media. As a result, some courts have had difficulty in determining whether defamatory broadcasts fall within the traditional categories of libel and slander.

In a recent decision, *American Broadcasting-Paramount Theatres, Inc. v. Simpson,*[1] the Georgia Court of Appeals was faced with an alleged defamation resulting from the telecast of a dramatic presentation. In an episode of "The Untouchables," in which Alphonse Capone was depicted as being transported by a railway train to Alcatraz, a single guard was shown accepting a bribe for his aid in Capone's attempt to escape. There were two men who had, in fact, worked inside Capone's car: plaintiff and the captain of the guard. The Court *held* that since a defamatory broadcast contains elements of both libel and slander, such a broadcast constitutes a new cause of action which the Court termed "defamacast." Since such a broadcast has an immense capacity for harm, it was held to be actionable per se. The Court also stated that the plaintiff could show that he was the guard referred to either through extrinsic facts or by merely establishing that he was one of the two-man group.

Defamation is the result of the publication to others of false statements which injure the individual's name and reputation and lower his standing in the community.[2]

[1] 106 Ga. App. 230, 126 S.E.2d 873 (1962).

[2] PROSSER, TORTS 574 (2d ed. 1955); SEELMAN, LAW OF LIBEL AND SLANDER IN THE STATE OF NEW YORK 1 (1933); SPRING, RISKS AND RIGHTS IN PUBLISHING, TELEVISION, RADIO, MOTION PIC-

Originally, the common-law action on the case, as it existed in the sixteenth century, conceived of no distinctions between oral and written defamation and applied the same standards to both.[3] The action for written defamation, termed libel, was introduced into the common law by the Star Chamber.[4] When the common-law courts assumed jurisdiction over spoken defamation, termed slander, recovery was allowed only in those cases where there was allegation and proof of special damages,[5] except in certain classes of cases where damages would be presumed.[6] When the Star Chamber was abolished, the distinction between oral and written defamation was preserved.[7] This distinction was a meaningful one because libel was an act from which damages were conclusively presumed,[8] whereas, as indicated, slander required allegation and proof of special damages, unless the remarks were slanderous per se.[9]

Where the defamation has occurred as a result of a radio broadcast, the courts have construed a defamatory remark read from a *script* as a libel;[10] if the same remark were *impromptu,* it has been held to be a slander.[11] With regard to television broadcasts, certain analogies may be drawn to the problems arising from defamation by motion pictures because of the similarity in visual and sound aspects of both media.[12] In ap-

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TURES, ADVERTISING, AND THE THEATER 41 (2d ed. 1956); Newhouse, *Defamation By Radio: A New Tort,* 17 ORE. L. REV. 314 (1938); Note, 69 HARV. L. REV. 877 (1956).

[3] Hartmann v. Winchell, 296 N.Y. 296, 303, 73 N.E.2d 30, 33 (1947); 1 HARPER & JAMES, TORTS 372 (1956). For an excellent discussion of the early history of the law of defamation, see Veeder, *The History and Theory of the Law of Defamation,* 3 COLUM. L. REV. 546 (1903); 3 RESTATEMENT, TORTS § 568, comment *b* (1938).

[4] The Star Chamber accomplished this by adopting the Roman Law and adapting it to its own purposes. But in the Roman Law, distinctions between defamatory statements were based upon the manner and extent of publication and not between speech and writing. Veeder, *supra* note 3, at 563-64.

[5] "By special damages is meant definite, concrete, and specific proof of injury. Moreover, the injury must result in specific monetary loss." SPRING, *op. cit. supra* note 2, at 43.

[6] Slander which is actionable without proof of special damages is slander per se. There are four instances of slander per se: the charge of serious crime, Brooker v. Coffin, 5 Johns. 188, 191, 4 Am. Dec. 337, 338 (N.Y. 1809); HARPER & JAMES, *op. cit. supra* note 3, at 377; 3 RESTATEMENT, TORTS § 571 (1938); the imputation of a loathsome disease, Williams v. Holdredge, 22 Barb. 396, 399 (N.Y. 1854); statements affecting one in his trade, business or profession, Rager v. McCloskey, 305 N.Y. 75, 79, 111 N.E.2d 214, 216 (1953); HARPER & JAMES, *op. cit. supra* note 3, at 381; 3 RESTATEMENT, TORTS § 573 (1938); the imputation of unchastity to a woman, Crellin v. Thomas, 122 Utah 122, 247 P.2d 264 (1952); HARPER & JAMES, *op. cit. supra* note 3, at 386; 3 RESTATEMENT, TORTS § 574 (1938).

[7] This distinction was severely criticized but it was felt that so great was the weight of precedent that it could not be ignored. Thorley v. Lord Kerry, 4 Taunt. 355, 366, 128 Eng. Rep. 367, 371 (1812). However, at least one court has decided that there should be no distinction between oral and written defamation. Grein v. La Poma, 54 Wash. 2d 844, —, 340 P.2d 766, 768 (1959).

[8] Henn, *"Libel-By-Extrinsic-Fact,"* 47 CORNELL L.Q. 14, 17 (1961).

[9] MCCORMICK, DAMAGES § 113 (1935).

[10] Hartmann v. Winchell, *supra* note 3.

[11] Locke v. Gibbons, 164 Misc. 877, 299 N.Y. Supp. 188 (Sup. Ct. 1937). Some commentators classify all defamation by radio as libel. SEELMAN, *op. cit. supra* note 2, at 3; SPRING, *op. cit. supra* note 2, at 47; Vold, *The Basis for Liability for Defamation by Radio,* 19 MINN. L. REV. 611, 613 (1935). The distinction between defamatory remarks read from a script and those that are impromptu has been severely criticized because it is immaterial to the radio listener whether the words are read or ad libbed. Donnelly, *Defamation by Radio: A Reconsideration,* 34 IOWA L. REV. 12, 15 (1948).

[12] Barry, *Radio, Television and the Law of Defamation,* 23 AUSTL. L.J. 203, 212 (1949); Note, 42 VA. L. REV. 63, 73 (1956).

plying the law of defamation to motion pictures, defamatory matter appearing on the screen is treated as libel.[13] However, it has been suggested that the motion picture cases should be applied to defamation by television only when the telecast consists of a filmed or otherwise recorded program because a "live" telecast more closely resembles a radio broadcast and the rules developed therefor should be applicable.[14]

The Court, in the principal case, cognizant of the script-impromptu test applied to defamatory broadcasts, rejected it on the grounds that the listener or viewer is apathetic, and, in most instances, ignorant as to the employment of a script. The second and perhaps more important ground for rejection was the fact that the broadcast's capacity for harm was not lessened by the use or non-use of a script.[15]

Having rejected this prevailing test as to whether a broadcasted defamatory statement is a libel or a slander, the Court then proceeded to reject the categorization of defamation as either libel or slander. Instead, the Court created a new cause of action which is applicable to all defamatory broadcasts. The Court termed it "defamacast" and held it to be actionable per se.[16] The creation of this new cause of action was grounded upon the common law and statutory construction.

The unique faculty of the common law has been its ability to adjust to the complexities of modern civilization and the problems that are coexistent with it.[17] Rather than being bound by prior concepts of libel and slander, the Court felt that the realistic approach is to recognize that defamation by broadcast inherently involves elements of both libel and slander.[18] Therefore, since it has elements of both, it cannot be easily subsumed under either category.

By construing a Georgia statute[19] applicable to defamatory broadcasts by either a sound or visual broadcasting station, the Court indicated that the legislature appreciated that defamation by broadcast is sui generis. The statute refers to defamation by broadcast as a defamatory statement. Since the legislature did not classify a defamatory

[13] Yousoupoff v. Metro-Goldwyn-Mayer Pictures, [1934] 50 T.L.R. 581. Motion pictures have been classified as libel because film is similar to a writing and the sound track is merely ancillary to it. *Ibid.*

[14] 43 CORNELL L.Q. 320 (1957).

[15] For a discussion of "capacity for harm," see Donnelly, *supra* note 11, at 18; Finlay, *Defamation by Radio,* 19 CAN. B. REV. 353, 359-60 (1941); Note, 42 VA. L. REV. 63, 66 (1956). The permanence of form test was popularized by Mr. Justice, then Chief Judge, Cardozo in Ostrowe v. Lee, 256 N.Y. 36, 175 N.E. 505 (1931). "What gives sting to the writing is its permanence of form." *Id.* at 39, 175 N.E. at 506.

[16] However, some writers have taken the position that only nominal damages should be recovered in all defamation actions unless the extent of the damages could be shown. *E.g.,* Courtney, *Absurdities of the Law of Slander and Libel,* 36 AM. L. REV. 552, 564 (1904). Another view is that all defamation is actionable without showing any actual damages. Paton, *Reform and the English Law of Defamation,* 33 ILL. L. REV. 669, 670 (1939).

[17] Oppenheim v. Kridel, 236 N.Y. 156, 164, 140 N.E. 227, 230 (1923).

[18] "It [radio] was not conceived nor dreamed of when the law of libel and slander was being formulated.... [A]s defamation by radio possesses many attributes of both libel and slander, but differs from each, it might be regarded as a distinct form of action." Summit Hotel Co. v. National Brodcasting Co., 336 Pa. 182, 200, 8 A.2d 302, 310 (1939); Newhouse, *Defamation by Radio: A New Tort,* 17 ORE. L. REV. 314 (1938).

[19] GA. CODE ANN. § 105-712 (1956); see Leflar, *Radio and TV Defamation: "Fault" or Strict Liability?,* 15 OHIO ST. L.J. 252, 267 70 nn. 62-64 (1954), for those states which have a similar statute.

statement as a libel or slander, the Court felt that it was not bound to do so.

Having treated defamation by broadcast as sui generis, the Court considered how plaintiff might prove that the defamation referred to him.[20] The conclusion of the Court was that the plaintiff might proceed upon either the "extrinsic fact" theory or the "alternative defamation" theory.

In the broadcast which was allegedly defamatory, plaintiff's name was not used nor did the actor who portrayed the corrupt guard physically resemble plaintiff. Hence, on its face the defamation did not refer to plaintiff. In all actions for defamation, the plaintiff must allege and prove that the defamation referred to him. Where, on its face it is applicable to a plaintiff, there is no difficulty. However, where such is not the case, the plaintiff must show by extrinsic facts that the defamation referred to him.[21]

In 1934 when Capone was being transported, two guards were stationed in Capone's car: plaintiff and the captain of the guard. In the television broadcast, the guard depicted as taking the bribe was not shown to be a person in authority – such as the captain of the guard. In light of this fact, since plaintiff was the only other guard on the train, the Court felt that plaintiff fulfilled the burden of proving that the defamation referred to him.

The Court further stated that even if plaintiff was not sufficiently identified by extrinsic facts, both he and the other guard could maintain an action. The Court did not expressly indicate upon what grounds it arrived at this conclusion but it seems that it analogized from those cases allowing members of a group, limited in number, to recover for defamation of the group.[22]

The Court considered the facts of the principal case to be unique and without precedent. However, an analogous situation seems to have been involved in *Forbes v. Johnson*.[23] The defendant in that case charged that a promissory note, held by two brothers, had been fraudulently altered, without identifying the brother who had allegedly altered it. The defendant demurred, as in the principal case, on the grounds that the complaint did not justify the inference that the charges were intended to refer to the plaintiff. The court, however, stated: "A charge that one or the other of two persons committed a crime, is in truth, an imputation against both, and gives to each a right of action."[24]

It would appear that the most significant aspect of this decision is not that it created a new cause of action, but that this new cause of action is actionable per se, that is, actionable without proof of special damages.[25]

The rule formulated in the principal case

[20] To maintain an action for defamation, the plaintiff must show that the publication is referable to him. Harris v. Santa Fe Townsite Co., 58 Tex. Civ. App. 506, 125 S.W. 77 (1910).

[21] "In framing a declaration for defamation, when the defamatory meaning of the communication or its applicability to the plaintiff depends upon extrinsic circumstances, the pleader avers their existence in a prefatory statement called the 'inducement.' In what is ordinarily called the 'colloquium,' he alleges that the publication was made of and concerning the plaintiff and of and concerning the extrinsic circumstances. The communication he sets forth verbatim and in the 'innuendo' explains the meaning of the words." 3 RESTATEMENT, TORTS § 563, comment *f* (1938).

[22] Neiman-Marcus v. Lait, 13 F.R.D. 311 (S.D.N.Y. 1952); Montgomery Ward & Co. v. Harland, 205 Miss. 380, 38 So. 2d 771 (1949).

[23] 50 Ky. 48 (1850).

[24] *Id.* at 50 (dictum).

[25] 3 RESTATEMENT, TORTS § 569, comment *b* (1938).

that defamatory broadcasts are actionable per se will greatly benefit a plaintiff. Since special damages mean actual pecuniary damage, a plaintiff will not have to allege and prove such damages because damages would be presumed.[26] Since damages, therefore, would be presumed from a defamatory broadcast, it might be argued that this would give rise to frivolous and trivial claims. However, those jurisdictions which have made all defamation, whether oral or written, actionable without proof of damage have done so without undue difficulty.[27]

Traditionally, the main reason why a written, and not an oral, defamation is deemed to be actionable per se is the permanence of form that a writing has.[28] The Court, however, rejected this permanence of form criteria in the area of defamatory broadcasts, and based its holding on the enormous capacity for harm that radio and television broadcasts have.

It is interesting to examine how New York handles defamatory broadcasts. In New York a defamatory statement read from a script would be a libel, whether it occurred on radio[29] or television.[30] It is not clear, however, whether an extemporaneous defamatory remark, broadcast over television, is a libel or slander.[31]

Traditionally, a libel was actionable per se, that is, damages were conclusively presumed.[32] However, New York has adhered to the libel per se and libel per quod distinction.[33] A libel which is defamatory on its face is a libel per se and no damages need be alleged or proved.[34] On the other hand, where the libel is not defamatory on its face, but extrinsic facts are required to show the defamatory meaning, it is a libel per quod and special damages must be alleged and proved.[35]

In those cases which have held a defamatory broadcast to be a libel, the defamatory meaning was apparent on its face;[36] hence, the courts did not consider whether the libel per se and per quod distinction was applicable to radio and television broadcasts. However, in *Davidson v. National Broadcasting Co.*,[37] a plaintiff alleged that she was libeled on a television program. The court dismissed this cause of action on the grounds that, since the defamation was not apparent from the television presentation itself but only because of extrinsic facts, plaintiff's failure to allege special damages necessitated dismissal of her cause of action.[38] Hence, it would appear that in New York, where a person has alleged he has been defamed by a broadcast, unless the defamatory meaning is apparent on its face, a plaintiff will have to allege and prove special damages.

[26] PROSSER, TORTS 593 (2d ed. 1955); SEELMAN, LAW OF LIBEL AND SLANDER IN THE STATE OF NEW YORK § 374 (1933).

[27] PROSSER, *op. cit. supra* note 26, at 595-96.

[28] Hartmann v. Winchell, 296 N. Y. 296, 301, 73 N.E.2d 30, 34 (1947).

[29] *Ibid.*

[30] Landau v. Columbia, 205 Misc. 357, 128 N.Y.S.2d 254 (Sup. Ct. 1954).

[31] Shor v. Billingsley, 4 Misc. 2d 857, 158 N.Y.S.2d 476, *aff'd*, 4 App. Div. 2d 1017, 169 N.Y.S.2d 416 (1st Dep't 1957) (extemporaneous remark on television was held to be libel). *Contra*, Remington v. Bentley, 88 F. Supp. 166 (S.D.N.Y. 1949).

[32] Prosser, *Libel Per Quod*, 46 VA. L. REV. 839, 842 (1960).

[33] O'Connell v. Press Publishing Co., 214 N.Y. 352, 108 N.E. 556 (1915); McNamara v. Goldan, 194 N.Y. 315, 87 N.E. 440 (1909).

[34] Prosser, *supra* note 32, at 844.

[35] *Ibid.*

[36] Hartmann v. Winchell, *supra* note 28; Shor v. Billingsley, *supra* note 31.

[37] 26 Misc. 2d 936, 204 N.Y.S.2d 532 (Sup. Ct. 1960).

[38] *Id.* at 938, 204 N.Y.S.2d at 535.

The question, therefore, is whether the per se and per quod distinction should be applied to defamatory broadcasts, or whether all broadcasts should be actionable per se. The basis for holding that a libel per quod is not actionable until the extrinsic facts are shown is that until those facts are proved, no defamation is made out.[39] In most instances it is likely that the defamatory meaning would not be known to the general public but only to a relatively few people.[40]

The per se and per quod distinction should be applied to defamatory broadcasts, but only in the sense that if the defamatory meaning of a statement is not apparent on its face, a plaintiff should have the burden of proving, through extrinsic facts, the defamatory meaning of the words. Once he has proved the defamatory meaning of the words, it would appear that courts have their choice of three rules in determining proof of damages.

At one extreme, a court could require proof of special damages by a plaintiff. But, as has been previously mentioned, special damages are difficult, and often, impossible to prove.[41] At the other extreme, a court could rule in all cases that damages would be conclusively presumed, that is, the defamation would be actionable per se. This rule would seem to be justified because of the tremendous capacity for harm that such broadcasts have. The courts could also refuse to apply the per se-per quod distinction to radio and television on the ground that such a distinction would only add confusion to an already confused situation.[42]

An objection may be raised that since the defamatory meaning of statements not defamatory on their face would be known only to relatively few people,[43] such broadcasts should not be actionable per se. There may be two answers to this objection. First, it makes no difference to the defamed party whether the defamatory meaning is apparent on its face or only through extrinsic facts because he may be just as severely injured in either case.[44] Second, the jury may consider the notoriety of extrinsic facts among those to whom the defamatory statement was broadcast in assessing the amount of damages.[45]

But there may be courts that are reluctant to hold that all defamatory broadcasts are actionable per se. Yet, the same courts may consider proof of special damages where the defamatory meaning is not apparent on its face as too severe a burden to impose upon a plaintiff. Naturally, where the defamatory meaning is apparent on its face, it should be actionable per se. There appears, however, to be a middle ground a court may take where the defamatory meaning is not apparent on its face.

Whether a statement is defamatory on its face or only because of extrinsic facts, it has a tendency to diminish the respect or confidence in which a plaintiff is held.[46] This would seem to be especially so in the area of defamatory broadcasts because of the vast audiences that such broadcasts have. In the light of this, a court could reasonably conclude that when a statement is not defamatory on its face, a plaintiff has

[39] Prosser, *supra* note 32, at 849.
[40] *Ibid.*
[41] Note, 69 HARV. L. REV. 875, 888 (1956).
[42] MCCORMICK, DAMAGES § 113 (1935).
[43] Prosser, *Libel Per Quod,* 46 VA. L. REV. 839 (1960).
[44] HENN, *"Libel-By-Extrinsic-Fact,"* 47 CORNELL L.Q. 14, 46 (1961).
[45] *Ibid.*
[46] PROSSER, TORTS 574 (2d ed. 1955).

the burden of proving the defamatory meaning through extrinsic facts; but when such defamatory meaning is established, a presumption, rebuttable by the broadcaster, that the plaintiff was injured might arise. This would avoid imposing upon the plaintiff the almost impossible burden of proving special damages and yet, would provide the broadcaster with an opportunity to prove that the extrinsic facts were not widely known and hence, that the plaintiff was not damaged or that his damages were negligible.

Whatever rule a court may adopt concerning damages, it would appear that, in the public interest and in the light of modern communication, a court should rule either that all defamatory broadcasts are actionable per se or that, where a defamatory broadcast is defamatory only through extrinsic facts, a rebuttable presumption should arise that a plaintiff has been injured.