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# The Law of Defamation—Suggestions for Reform

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# THE LAW OF DEFAMATION—SUGGESTIONS FOR REFORM

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The law of defamation is generally recognized as the least satisfactory part of our law of Torts. It consists too largely of "historical survivals of the relics of forgotten jurisdictional conflicts"[1] in the evolution of the English law of slander and libel. In many instances, it makes the publisher strictly liable for publishing what turns out to be defamatory whether substantial or trivial; in other situations, it refuses to compensate the plaintiff for what is established as a real and genuine injury.

It consists of an indefensible differentiation between slander and libel, the former carrying four or five per se categories making the defendant liable without proof of actual damage,[2] but otherwise providing that actual damage must be proved.

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[1]PROSSER, TORTS, 808.

[2]The imputation of a serious crime; the imputation of certain loathsome diseases; imputations affecting the plaintiff in his business, trade, profession or office; in some jurisdictions, the imputation of unchastity to a woman. PROSSER, **supra**, Note 1, 793. By R.C.M. 1935, §5691, to "impute to him impotence or want of chastity" is slanderous per se; also "to charge any person with crime, or with having been indicted, convicted or punished for crime." Under the similar California statute, imputation of any crime is held to be enough. Mellen v. Times Mirror Co. (1914), 140 P. 277; 16 Cal. Jur. 50. Most courts hold it must be an imputation of a crime chargeable by indictment or its modern equivalent and punishable by death or by imprisonment otherwise than in lieu of fine. RESTATEMENT, TORTS, §571. Thus, it is slander per se to say that one is a "thief," but not to say that he is a "thievish knave." BOHLEN, CASES, TORTS, 2d Ed., 773. It is libelous to write that one is a "hypocrite and uses the cloak of religion for unworthy purposes" though an action would not lie for the words if spoken. Thorley v. Lord Kerry (1812) 4 Taunt. 355.

By the prevailing view, libel does not require proof of actual damage.[3] Montana is, however, a minority jurisdiction as to this, the cases differentiating libel per se, that is on its face, not requiring proof of actual damage, from libel per quod, that is libelous only on a showing of extrinsic circumstances making it defamatory, requiring proof of actual damage.[4]

The advent of radio defamation has invited re-examination of the entire law on the subject. The query has been whether the radio station should be strictly liable as is the newspaper or liable only based on negligence or fault as is the subordinate publisher, say a news-vendor.[5] Early cases took the first position, but later cases indicate a tendency to place liability on the basis of negligence. The Montana legislature in 1939 passed a statute relieving the radio station in considerable measure from the strict liability pertaining to a news-

[3]PROSSER, **supra,** note 1, 793.

[4]Lemmer v. Tribune et al. (1915) 50 ont. 559, 148 P. 338; Rowan v. Gazette Printing Co. (1925), 74 Mont. 326, 239 P. 1035; Woolston v. Montana Free Press (1931) 90 Mont. 299, 2 P. (2) 1020; Griffin v. Opinion Pub. Co. (1943) 114 Mont. 502, 138 P (2) 580; and see Hoffman, 8 MONT. L.R. 76 (1947).

[5]Held to be libel, entailing liability at peril as for a main publisher, Sorenson v. Wood (1932) 123 Neb. 348, 243 N.W. 82; Coffey v. Midland Br. Co. (1934) 8 F Supp. 889. Held to be slander and defendant liable for negligence, Summit Hotel Co. v. Nat'l. Br. Co. (1939) 336 Pa. 182, 8 A. (2) 302, 124 A.L.R. 968; Locke v. Gibbons (1937) 299 N.Y.S. 188. Some regard radio as a thing apart unto itself—a "new tort," Newhouse, 17 ORE. L.R. 314 (1938); Meyer, 2 THE LAWYER AND LAW NOTES 7 (1948); Sprague, 11 AIR LAW REVIEW 17 (1940). The Restatement of Torts, §577 expresses no opinion as to whether the liability at peril of an original publisher should apply; by §581, the Restatement indicates that at least the radio station should be liable as a subordinate publisher for fault.

paper publisher.[6] It is believed that whatever law pertains to the one should also apply to the other.

A publisher **may** intend one or more of the following:

1. He may intend by words or conduct to make a particular statement.
2. He may intend to communicate it to a person other than the plaintiff.
3. He may intend that it shall be understood to refer to the plaintiff.
4. He may intend it to convey a defamatory meaning.
5. He may intend that the meaning shall be false.
6. He may intend to cause damage to the plaintiff's reputation.

But, under the existing case-law, as to all the above elements except the second, he is liable though he didn't intend and though he was not negligent; as to all except the second he is liable strictly for innocent conduct.[7] As to the second, namely publication, the communication must be a culpable pub-

[6]LAWS OF MONT., 1939, ch. 122. The Act provides that: (a) The radio operator is not liable in the absence of proof of actual malice for allowing a candidate for office or other person to use the radio for discussion of a controversial or "any other subject." (b) The radio operator has the right but is not compelled to require a copy of a proposed address 48 hours before broadcast time. (c) The radio operator is not relieved from liability for a broadcast prepared by him or by any of his officers or employees in course of empoloyment. (d) Where liability attaches, and two or more stations are connected together for joint operation in the making of the broadcast, liability shall be confined to the originating station.

[7]Prosser, note 1, 808; RESTATEMENT, TORTS, §§579-80.

lication, that is, it must be published either intentionally or negligently.[8]

Such law makes possible the use of the law of defamation for purposes of extortion; it probably produces an undue number of lawsuits oft-times unfounded. Reform of the law has been slow. Legislation is advisable. Courts follow the case-law precedents. We cannot expect reform from that quarter. The matter is being considered in England. The English Press Union Bill was introduced in 1938 but failed of passage.[9]

A fusion of the law of slander and libel is of first consideration. The following proposals for uniting them have, therefore, been made.

1. To require proof in all cases of actual damage. This is probably too favorable to the publisher. It would do away with serious abuse of the action as a weapon of extortion. However, proof of actual damage is often impossible where from the character of the words and the circumstances of publication, it must have occurred.

2. To make all defamation, oral or written, actionable without proof of damage. But this would increase the opportunity for extortion. Damage from many hastily spoken words, moreover, is trivial, harmless and unworthy of redress. Freedom of speech should make allowance for some expression of unflattering views. Never to require

[8]RESTATEMENT, TORTS, §577.

[9]See Paton, **Reform and the English Law of Defamation,** 33 Ill. L.R. 669 (1939).

proof of actual damage is probably too favorable to the plaintiff's case.[10]

As a mean, between the interest of the plaintiff in good reputation and a good name, and the interest of the public in free speech and the rapid dissemination of news, the following legislation is suggested:

1. Abolish the distinction between libel and slander.
2. Generally require the proof of actual damage in defamation cases.
3. Distinguish major and minor defamation, and place discretion in the court, in the particular case, to find the defamation of the former type and so actionable without proof of actual damage.[11]
4. Distinguish extensive publication from limited publication and place discretion in the court, in the particular case, to find extensive publication as by newspaper, radio, or public speech and so actionable without proof of actual damage.[12]
5. For the present rule of strict liability for innocent conduct re intent to make a particular statement, or that the statement refer to plaintiff, or that it convey a defamatory

[10]Prosser, **supra,** note 1, 809.

[11]This is the tenor of the English Press Union Bill introduced in 1938. See Paton, **supra,** note 9.

[12]Prosser, **supra,** note 1, 809. "Some combination of the last two possibilities, as in the French law, seems most likely ultimately to be adopted. Thus it is possible that action without proof of damage might lie only for public defamation carrying a major imputation, and that in all other cases damages must be proved."

meaning, or that it be false, or that it cause damage to the plaintiff's reputation, substitute a rule requiring a high degree of care on the part of the publisher and a presumption that defamatory statements are made negligently, thus placing on the publisher the burden of excusing himself on these points.[13]

6. Retain the existing rule that plaintiff must assume the burden of proving a culpable publication, namely, that defendant intentionally or negligently publish the defamatory matter.

7. Finally, as a wisely precautionary measure, it would probably be well to expressly provide that the indefensible minority position of **Rowan v. Gazette Printing Company**[14] differentiating libel per se from libel per quod as to the necessity of proof of actual damage be abolished.

[13]Prosser, **supra**, note 1, 818.
[14]**Supra**, note 4.