

the jury might reasonably believe that the tools were in fact "burglar's tools" within the purview of the statute. It is submitted, therefore, that as a practical matter, the variations in wording and interpretation of the burglary statutes of the several states are really distinctions without a difference.

TORTS: THE REMEDY OF A PERSON DEFAMED ON RADIO OR TELEVISION
AGAINST HIS DEFAMER—A CRITIQUE

Basic to the Anglo-American legal system is the premise that the common law is a flexible instrument of justice, capable of developing to meet the needs of a society living in conditions completely different from, and entirely unanticipated by, the society in which the law originated.¹ The capacity of the common law to grow has been seriously challenged in recent years by the inventions of radio and television and the appearance of broadcast² defamation cases. Whether the common law affords the person defamed on a broadcast a remedy against his defamer is a question which the courts have found especially difficult to answer.³ The causes of this difficulty lie in peculiarities of the common law which date from 1812, when the division of defamation into the torts of libel and slander was definitely settled by *Thorley v. Lord Kerry*.⁴ At that time it was believed that the distinction between the torts was a purely formal one: libel was written, slander was oral, defamation.⁵ Libel, however, carried the more serious consequences. The plaintiff in a libel suit recovered upon showing he had been defamed, without proving damage.⁶ In slander, on the other hand, unless the offensive words fit into one of several narrow categories known as "slander per se,"⁷ plaintiff was required to prove special damage.⁸ Special damage was restricted to actual pecuniary loss, pleaded in detail and proved precisely as pleaded.⁹

1. See *Woods v. Lancet*, 303 N.Y. 349, 354-55, 102 N.E.2d 691, 694, 27 A.L.R.2d 1250 (1951).

2. Throughout this comment, the word "broadcast" is used to denote radio and television cases collectively.

3. This comment deals primarily with this problem. The equally intriguing question of the liability of the broadcasting station is not considered except as it illuminates the main issue.

4. 4 Taunt. 355, 128 Eng. Rep. 367 (1812).

5. PROSSER, TORTS § 93 (2d ed. 1955) (hereafter cited PROSSER).

6. *Ibid.*; 1 HARPER & JAMES, TORTS § 5.9 (1956); 3 RESTATEMENT, TORTS § 569 (1938) (hereafter cited RESTATEMENT).

7. The categories were: imputations of serious crimes; imputations of certain loathsome diseases; imputations affecting the plaintiff in his business, trade, profession or office; and, in some jurisdictions, imputations of unchastity to women. PROSSER § 93.

8. *Ibid.*; RESTATEMENT § 575.

9. MCCORMICK, DAMAGES §§ 114-15 (1935).

Because of these peculiarities, which the modern law inherited, plaintiff was better off in libel than in slander.¹⁰

Since defamation is a tort against a person's reputation,¹¹ the law has always required that the defamation be "published,"¹² that is, communicated to someone other than the person defamed.¹³ Those who publish a defamation, whether a libel¹⁴ or a slander,¹⁵ are strictly liable even though they did not originate it. A "disseminator," on the other hand, who merely circulates the physical embodiment of a defamation already communicated to another,¹⁶ e.g., a newsboy, is liable only if he has reason to know the material contains a defamation,¹⁷ *i.e.*, in the absence of due care.¹⁸

Recently some courts have reduced the importance of the libel-slander distinctions by partly consolidating the torts. The consolidation apparently results from confusing the two meanings which the common law of defamation assigned to the term "per se."¹⁹ The term was used to designate those slanders actionable without proof of special damage. In this sense, it could never be applied to libel.²⁰ It was also applied to obviously defamatory words, such as "you

10. These arbitrary differences between libel and slander were largely the result of historical accident. Ecclesiastical courts originally had jurisdiction over all defamation. When common law courts wrested this jurisdiction from the church courts, printing was rare and writing beyond the capability of the average non-cleric. Most defamations handled by the law courts were therefore oral. During the period when jurisdiction over defamation was moving from one court to the other, damage rather than insult became the gist of the action, which could not be maintained without proof of injury. The law courts did presume damage in certain instances, but merely as expedients for further extending their jurisdiction at the expense of the church tribunals. These expedients later developed into the categories of "slander per se." Meanwhile, with the spread of printing, the Star Chamber was given jurisdiction over libel, which was a crime as well as a tort. Breach of the peace was the gist of the action and a showing of injury was not required. When the law courts assumed jurisdiction over libel upon the abolition of the Star Chamber, they tended to keep it separated from their older action of slander. Thus, by 1812, it was established that slander was oral defamation requiring proof of special damage, except in certain narrow areas, while libel was written defamation requiring no showing of injury.

The above paragraph is substantially a paraphrase of RESTATEMENT § 568, comment *b*. The definitive work on the historical background of defamation is Van Vechten Veeder, *History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903).

For a view that the law of defamation was not the result of historical accident, see Cardozo, J. in *Ostrove v. Lee*, 256 N.Y. 36, 39, 175 N.E. 505, 506 (1931): "The schism in the law of defamation between the older wrong of slander and the newer one of libel is not the product of mere accident. . . . It has its genesis in evils which the years have not erased."

11. RESTATEMENT § 559; PROSSER § 92; 1 HARPER & JAMES, TORTS § 5.1 (1956).

12. RESTATEMENT § 558.

13. *Id.* § 577, comment *b*; PROSSER § 92.

14. RESTATEMENT § 578, comment *b*.

15. *Id.* § 578, comment *c*.

16. *Id.* § 581, comment *a*.

17. *Id.* § 581.

18. See PROSSER § 94, at 604-05.

19. *Id.* § 93, at 588; MCCORMICK, DAMAGES § 113, at 417-19 (1935).

20. See text supported by notes 6-8 *supra*.

robber," to distinguish them from words which were defamatory only when extrinsic facts became known.²¹ In the latter sense, "per se" could be applied to both libel and slander. The confusion apparently began with a holding that if a libel was not defamatory "per se"—that is, not defamatory on its face—special damage would have to be proved.²² This misapplication of the rule governing slanders actionable only upon proof of special damage to libels not defamatory on their face has been adopted by a majority of courts that have considered the question,²³ although the extent of the resulting consolidation varies.²⁴ In some states all defamations require a showing of special damage unless they fall into the narrow common law categories of slander actionable without such damage.²⁵

After the division into libel and slander in 1812, the common law encountered new modes of defamation. These innovations were absorbed without apparent difficulty and generally were characterized as libel. Thus it was held libellous to use signs²⁶ or pictures²⁷ to humiliate plaintiff; to burn his effigy;²⁸ to dishonor his valid check;²⁹ and to "shadow" him in an obvious manner.³⁰ Hanging a red lantern at the front door of the home of respectable women has been held libel.³¹ This expansion of libel to include more than writing and printing invalidated the traditional oral-written distinction and scholars began groping for another to replace it. For a time it was thought that libel was communicated by sight and slander by sound.³² The collapse of this test³³ led to the formulation of two others which live today alongside the early oral-written test. The new formulations are not "tests" in the strict sense that they pretend to separate the cases on some definite, inflexible basis. Rather, they are only factors

21. An example of words which become defamatory only when extrinsic facts are known is a newspaper item reading, "John and Mary Jones are the parents of a son born yesterday," when John and Mary Jones have been married only a month.

22. See authorities cited in note 19 *supra*.

23. PROSSER § 93, at 588.

24. *Developments in the Law—Defamation*, 69 HARV. L. REV. 874, 889-91 (1956).

25. *Ibid.*

26. *Haylock v. Sparke*, 1 El. & Bl. 471 (1853).

27. *Burton v. Crowell Publishing Co.*, 82 F.2d 154 (2d Cir. 1936); *DuBost v. Beresford*, 2 Camp. 511 (1810).

28. *Johnson v. Commonwealth*, 14 Atl. 425 (Pa. 1888).

29. *Svensen v. State Bank of Duluth*, 64 Minn. 40, 65 N.W. 1086, 31 L.R.A. 552 (1896).

30. *Schultz v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 151 Wis. 537, 139 N.W. 386, 43 L.R.A. (n.s.) 520 (1913).

31. *Jefferies v. Duncombe*, 11 East 226, 103 Eng. Rep. 991 (1809).

32. PROSSER § 93, at 586. For anachronistic codifications of this distinction, see CALIF. CIVIL CODE §§ 45, 46 (Deering 1949); MONT. REV. CODE § 64-203 (1953); OKLA. STAT. ANN. tit. 12, § 1441 (1937).

33. A mute defaming another by sign language would be perpetrating slander. PROSSER § 93, at 586.

to be considered by the court in deciding whether a given defamation constitutes libel or slander.³⁴ The first test classifies any defamation embodied in a permanent form as libel.³⁵ The second distinguishes the torts by the magnitude of the potential harm, or the area of dissemination.³⁶

By a coincidence, widespread recognition was being accorded the new tests at roughly the same time that radio defamation cases first reached the courts.³⁷ This simultaneous appearance of a development in the law and a development in mass communication is one of the reasons the courts had difficulty with broadcast defamation. Radio can reach an audience of millions and can cause untold harm if used to circulate defamatory remarks. On the other hand, the words are unquestionably conveyed by voice, and they may or may not be embodied in some permanent form. For example, at least three types of defamatory programs can be imagined: (1) the program may follow a script containing the defamation; (2) the performer may deviate from a prepared script and suddenly inject the defamation, or; (3) the program may be spontaneous, e.g., an interview, and the defamation may be uttered extemporaneously. In addition, any of the three types may or may not be recorded. As might be expected, given so many variables, case holdings have not been consistent. In radio cases three courts have held³⁸ and two more have indicated³⁹

34. RESTATEMENT § 568, comments *d* and *g*.

35. *Id.* § 568(1).

36. *Id.* § 568(3); PROSSER § 93, at 596.

It is at least plausible that these new formulations are really functions of each other rather than distinct criteria because their purpose fails when they are not used together. For example, a defamatory book may cause very little injury whereas a defamatory remark over the radio may be greatly damaging. If one or the other criterion—but not both—is applied to the two cases supposed, anomalous results may be reached, viz., the book may be libellous and the person defamed able to recover even though he has not been injured, while the person defamed over the radio may be barred from recovery because of inability to prove the damage he actually suffered. This probably would have been the result under the old common law. PROSSER § 92, at 572. Aberrations like this gave added impetus to the movement for reformulating the distinction between libel and slander. 12 ALI PROCEEDINGS 345-55 (1935). Notice, too, that it is sometimes the permanence of form which makes the area of dissemination great, as in the supposed case of the book.

The criteria have been separated here for ease of analysis and because some courts, at least, treat them as independent. See *Locke v. Gibbons*, 164 Misc. 877, 883-84, 299 N.Y. Supp. 188, 192 (Sup. Ct. 1937); *Developments in the Law—Defamation*, 69 HARV. L. REV. 874, 888 (1956).

37. This is a surmise of the writer based upon the following facts: the American Law Institute discussed the tests at its 1935 meeting, ALI PROCEEDINGS, *supra* note 36; they were important enough to be incorporated in the *Restatement of Torts* § 568, in 1938; the first radio defamation case was decided in 1932, *Sorenson v. Wood*, 123 Neb. 348, 243 N.W. 82, 82 A.L.R. 1098.

38. *Charles Parker Co. v. Silver City Crystal Co.*, 142 Conn. 605, 116 A.2d 440 (1955); *Hartman v. Winchell*, 296 N.Y. 296, 73 N.E.2d 30 (1947); *Sorenson v. Wood*, *supra* note 37.

39. *Felix v. Westinghouse Radio Stations, Inc.*, 186 F.2d 1 (3d Cir. 1950); *Polakoff v. Hill*, 261 App. Div. 777, 27 N.Y.S.2d 142 (1st Dept. 1941).

that reading defamation from a script is libel. An Australian court held it slander⁴⁰ and two American courts have indicated they would agree with this.⁴¹ One dissenting judge urged that a new tort be created.⁴² One court has held a defamatory deviation from a script slander,⁴³ another has so stated in dictum,⁴⁴ a third has held it a new tort,⁴⁵ while two others have indicated it would be libel.⁴⁶

This confusion may be partly explainable by the fact that three of the earliest radio defamation cases, from which much of the later law was drawn, involved the station's liability rather than the speaker's. In the landmark case of *Sorenson v. Wood*,⁴⁷ for example, the question was whether the trial court had properly predicated the liability of the station on negligence. In holding the station strictly liable, the court did not discuss at length what the tort should be, but simply stated, "The underlying basis for liability is libel, and not negligent conduct."⁴⁸ The offensive words were read from a script, but whether this was the basis of the court's decision is not known. In spite of the holding, one is led to believe that the basis of the defamer's liability was all but forgotten, because the court's arguments were focused on the question of the station's liability. Similarly *Coffey v. Midland Broadcasting Co.*⁴⁹ involved the liability of a Missouri radio station for a defamatory remark uttered in a broadcast originating in New York. The court held the station strictly liable, even though it "assumed" the defamation had been interpolated without fault of the station. The court borrowed an analogy from the *Sorenson* case and likened the station to a newspaper, which is held strictly liable as a publisher.⁵⁰ The *Coffey* case illustrates another means by which confusion has crept into the law. The case is usually cited for the proposition that broadcast defamation is libel,⁵¹ although all the court explicitly decided was that the station was strictly liable.

40. *Meldrum v. Australian Broadcasting Co.*, [1932] Vict. L. Rep. 425.

41. *Lynch v. Lyons*, 313 Mass. 116, 20 N.E.2d 953 (1939); *Miles v. Louis Wasmer, Inc.*, 172 Wash. 466, 20 P.2d 847 (1933).

42. *Wachenfeld, J.* in *Kelly v. Hoffman*, 137 N.J.L. 695, 702, 61 A.2d 143, 147, 5 A.L.R.2d 951 (1948).

43. *Locke v. Gibbons*, 164 Misc. 877, 299 N.Y. Supp. 188 (Sup. Ct. 1937).

44. *Hartman v. Winchell*, 296 N.Y. 296, 73 N.E.2d 30 (1947) (libel if read from script, however; see note 38 *supra*).

45. *Summit Hotel Co. v. NBC*, 336 Pa. 182, 8 A.2d 302 (1939).

46. *Irwin v. Ashurst*, 158 Ore. 61, 74 P.2d 1127 (1938); *Coffey v. Midland Broadcasting Co.*, 3 F. Supp. 889 (W.D. Mo. 1934).

No radio cases involving extemporaneous defamatory remarks uttered during the course of spontaneous broadcasts have been found, nor any cases which rest their decisions on whether the broadcast was recorded.

47. 123 Neb. 348, 243 N.W. 82, 82 A.L.R. 1098 (1932).

48. *Id.* at 353, 243 N.W. at 85.

49. 3 F. Supp. 889 (W.D. Mo. 1934).

50. *E.g.*, *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 126 N.E. 260, 10 A.L.R. 662 (1920).

51. *E.g.*, PROSSER § 93, at 586 n.72.

It appears, then, that some courts desiring to impose strict liability upon stations will hold the tort libel in order to do so,⁵² while, conversely, any court which imposes strict liability will be interpreted as having held the defamation to be libel. It appears to have been overlooked that liability is also strict for publishing a slander.⁵³ These fallacies can be seen working in reverse in *Summit Hotel Co. v. NBC*,⁵⁴ in which the question was the liability of the network for a defamatory deviation from a prepared script. The Supreme Court of Pennsylvania rejected the newspaper analogy, saying it would be harsh to impose strict liability for a defamation which no amount of care could have prevented. The court also rejected a suggestion that the tort be classified as libel, but that the network be held liable only as a disseminator, viz., for lack of due care.⁵⁵ Instead, the court held that the tort, if any, was an entirely new one and dismissed the case. Thus the person uttering the defamatory remark was given the benefit of the confusion surrounding a new tort because the court considered it unfair to impose strict liability upon the network, and could not bring itself to treat the network as a disseminator.⁵⁶

Before the advent of television, defamatory movies had been held libellous⁵⁷ because the sound track "accompanies and is identified with the film itself."⁵⁸ In spite of this rather clear lead, the few television cases show the same split as in radio. Two courts have held that extemporaneous remarks made during a spontaneous program are libel⁵⁹ and one has held them slander.⁶⁰

In recent years, the importance of the question whether broadcast

52. See the quotation from the *Sorenson* case at note 48 *supra*. See also *Kelly v. Hoffman*, 137 N.J.L. 695, 702, 61 A.2d 143, 147, 5 A.L.R.2d 951 (1948): "The doctrine of so-called absolute responsibility can only be invoked by the application of the law of libel to broadcast defamation."

53. See text supported by note 15 *supra*.

54. 336 Pa. 182, 8 A.2d 302 (1939).

55. See text supported by notes 16-18 *supra*.

The suggestion was first made in a student note, 32 COLUM. L. REV. 1255 (1932), and was later supported by Professor Bohlen in *50 Years of Torts*, 50 HARV. L. REV. 725, 731 (1937).

56. The court felt the network played too active a part in the broadcast to be anything but a publisher if the law of defamation was to apply. 336 Pa. at 193, 8 A.2d at 309. Thus, the court refused to apply the law of defamation because, as a matter of policy, it would be unfair to the network. But when a method for applying the law of defamation without imposing strict liability was suggested, the court rejected it because, as a matter of strict precedent, the network was not a disseminator.

57. *E.g.*, *Brown v. Paramount Publix Corp.*, 240 App. Div. 520, 270 N.Y. Supp. 544 (1st Dept. 1934).

58. PROSSER § 93, at 586.

59. *Shor v. Billingsley*, 4 M.2d 857, 158 N.Y.S.2d 476 (Sup. Ct. 1957); *Sargent v. NBC*, 136 F. Supp. 560 (N.D. Calif. 1955). The *Sargent* case is apparently based on a misapprehension of New York law, however, since it cites *Hartmann v. Winchell*, 296 N.Y. 296, 73 N.E.2d 30 (1947) for the proposition that extemporaneous remarks are libel. See notes 38 and 44 *supra*.

60. *Remington v. Bentley*, 88 F. Supp. 166 (S.D.N.Y. 1949).

defamation should be libel or slander has diminished. Some states, as noted, have consolidated the torts.⁶¹ Six others have answered the question by statute: four classify it as libel⁶² and two as slander.⁶³ At least thirty-nine states relieve radio and television stations from liability for defamatory broadcasts, most of them imposing liability only in the absence of due care.⁶⁴ Decisions on the question of the tort committed by the defamer should no longer be influenced by policy arguments on the station's strict liability where these statutes are in effect,⁶⁵ although this error is still made today.⁶⁶

Numerous proposals for handling broadcast defamation have been made. It has been urged that all radio defamation be slander.⁶⁷ Radio stations and defamers both would benefit by this rule because the plaintiff would be required in many cases to prove special damage. The usual argument for the proposal is that the listener does not know that the words are being read from a script.⁶⁸ There are two objections to the argument. First, it assumes that there was a logical basis at common law for distinguishing libel from slander when in fact the distinction was arbitrary.⁶⁹ There seems to be no reason why an arbitrary classification of slander is to be preferred over an arbitrary classification of libel. Even more important is the fact that the common law, which early held that reading aloud from a printed document was libel,⁷⁰ never held it significant that the hearer might not know the words were being read. This recommendation achieves its ends only by importing a distinction that the common law, to which it appeals, never made.

61. See text supported by note 25 *supra*.

62. ILL. ANN. STAT. c. 38, § 404.1 (Supp. 1956); ME. REV. STAT. c. 130, § 32 (1954); ORE. REV. STAT. § 163.410 (1955); WASH. REV. CODE § 9.58.010 (1952). Illinois seems definitely to have made up its mind. In 1945, sections entitled "Slander by Radio" were deleted and a cross-reference to the above was inserted.

63. CALIF. CIVIL CODE § 46 (Deering 1949); N.D. REV. CODE § 12-2815 (1943). What California is going to do with television is problematical since it has defined libel as "a false and unprivileged publication by writing, printing, picture, effigy or other fixed representation to the eye . . ." *Id.* § 45. And see note 32 *supra*.

64. Note, 9 OKLA. L. REV. 103 (1956). See also Remmers, *Recent Legislative Trends in Defamation by Radio*, 64 HARV. L. REV. 727 (1951); Note, 42 VA. L. REV. 63 (1956).

65. Indeed, some legislatures have spelled this out by inserting a provision that the § relieving the station of liability is not to be applied to the speaker. See, e.g., WASH. REV. CODE § 19.64.020 (1952).

66. "To classify all radio defamation as libel invokes too great a burden on the broadcast station." 1 WARNER, RADIO & TELEVISION LAW § 37, at 449 (1953).

67. E.g., Sprague, *Freedom of the Air*, 8 AIR L. REV. 30 (1937). These proposals antedated television.

68. *Id.* at 43; *Irwin v. Ashurst*, 158 Ore. 61, 63, 74 P.2d 1127, 1129 (1938). The argument concerning the listener's ignorance was neatly disposed of in *Hartmann v. Winchell*, 296 N.Y. 296, 73 N.E.2d 30 (1947).

69. PROSSER § 93, at 595; MCCORMICK, DAMAGES § 113 at 416-19 (1935). See note 10 *supra*.

70. E.g., *Miller v. Donovan*, 16 Misc. 453, 39 N.Y. Supp. 820 (Sup. Ct. 1896); see PROSSER § 93, at 598.

Two courts have stated that broadcast defamation is libel when read from a script but slander when extemporaneous.⁷¹ This rule is open to criticism on two points.⁷² First, it is a reversion to the practice of deciding the issue solely on the basis of form. It was partly to eliminate purely formal distinctions that the new tests were formulated.⁷³ As modern writers say, "[N]o respectable authority has ever attempted to justify the [common law] distinction on principle,"⁷⁴ and "the reasons that have been given for [it] have been offered in explanation rather than in justification."⁷⁵ A return to the old common law at this date hardly seems apt. Secondly, both this rule and the proposal to classify all broadcast defamation as slander are unable to cope properly with television, which is capable of purely visual defamations, such as a sign in the background.⁷⁶ Any rule formulated in terms of "reading from a script" would be useless in such a case.⁷⁷

Writers have contended that (1) the common law ought to be overhauled using broadcast defamation as an excuse and a means,⁷⁸ or (2) that broadcast defamation, being unlike anything encountered by the common law, ought to be placed in a category of its own.⁷⁹ The second suggestion was followed in the *Summit Hotel* case, and has been echoed in a dissenting opinion.⁸⁰ Dean Prosser, who suggests

71. *Remington v. Bentley*, 88 F. Supp. 166 (S.D.N.Y. 1949) (television); *Hartmann v. Winchell*, 296 N.Y. 296, 73 N.E.2d 30 (1947) (radio). Many other courts have accepted one side of the proposition or the other. See notes 38, 39 and 43 *supra*.

72. The argument in support of classifying all broadcast defamation as slander, viz., that the listener does not know the words are being read, can be turned around and used to support the contention that it ought all to be libel. Since the common law always held reading from printed material libel, could it not be contended that all broadcast defamation ought to be libel because the listener does not know whether the words are being read?

73. See notes 34-36 *supra*, and text supported thereby.

What we have done in [§ 568] (3) is to attempt to avoid this arbitrary distinction between libel and slander and leave it for the courts to decide, only pointing out the factors which have in fact been regarded as important in making the distinction and let the law grow as it will along lines that we think are sound.

12 ALI PROCEEDINGS 348 (1935).

74. RESTATEMENT § 568, comment *b*.

75. PROSSER § 93, at 595.

76. *Cf. Landau v. CBS*, 205 Misc. 357, 128 N.Y.S.2d 254 (Sup. Ct. 1954).

77. It would seem that the added element of visual presentation ought to make a difference between television and radio when purely formal distinctions are used. *But see* to the contrary *Remington v. Bentley*, 88 F. Supp. 166 (S.D. N.Y. 1949).

78. PROSSER § 93, at 587.

79. 2 SOCOLOW, RADIO BROADCASTING § 468 (1939); Leflar, *Radio and TV Defamation: "Fault" or Strict Liability?*, 15 OHIO ST. L.J. 252, 261 (1954) ("assumed necessity" of classifying as libel or slander); Newhouse, *Defamation by Radio: A New Tort*, 17 ORE. L. REV. 314 (1938).

80. Wachenfeld, J. in *Kelly v. Hoffman*, 137 N.J.L. 695, 702, 61 A.2d 143, 147, 5 A.L.R.2d 951 (1948). What Justice Wachenfeld had in mind is unclear, however, because he also was in favor of imposing strict liability on the station and the speaker.

that courts use broadcast defamation to reorganize the rules of defamation, is nonetheless dissatisfied with the present consolidation of libel and slander.⁸¹ This may be disappointment because the consolidation rests upon an elementary mistake or because libel is being incorporated into slander rather than vice versa.⁸² The second suggestion, creating a new tort, has the attraction of intellectual novelty, but raises far more questions than it answers, and is open to numerous criticisms. First, what are the elements of the new tort and who is to define them, the courts or the legislatures? Secondly, it implicitly ignores the development of defamation between the year 1812 and the advent of radio. Why radio and television are any more novel than sound movies, which the common law absorbed without difficulty,⁸³ is not readily apparent.⁸⁴ Third, it is one thing to dismiss a suit on the ground that a claimed cause of action does not exist, but quite another to dismiss an established cause of action on the ground that a different one, not then extant, is the proper remedy. The action of the Pennsylvania court in the *Summit Hotel* case in this respect was quite unusual.⁸⁵ Fourth, it would appear undesirable to recommend a new tort when many writers agree there is already one tort too many.⁸⁶ Finally, the suggestion fails to recognize that some jurisdictions consistently refuse to adopt new causes of action. The most recent novel action, invasion of privacy,⁸⁷ furnishes an excellent case history. First adopted by a court in 1905,⁸⁸ invasion of privacy has since been recognized as a tort in twenty-three jurisdictions.⁸⁹ But without legislation, the courts in at least four states continue to reject it.⁹⁰ The antipathy of some courts to new causes of action is

81. PROSSER § 93, at 588. See text supported by notes 19-25 *supra*.

82. This is the feeling expressed in the most recent treatise on the subject. 1 HARPER & JAMES, TORTS § 5.9, at 373 n.9 (1956).

83. See text supported by notes 57-58 *supra*.

84. Mr. Socolow at § 468 of his treatise, *op. cit. supra* note 79, implies that the line of cases which led to the original breakdown of the oral-written distinction (see text at notes 26-36 *supra*) were red herrings. "Liability for defamation by conduct is superimposed as a convenience upon the law of libel to which it has no historic relation whatsoever." However, it is not clear why it was "convenient" to hold the dishonoring of a valid check, for example, to be libel, nor why it would be "inconvenient" to treat radio defamation under the common law of defamation.

85. The court rationalized its action on the ground that all defamation actions in Pennsylvania are laid in trespass. It is submitted, however, that this offers little assistance to a plaintiff who wants to know what he must plead and what he must prove.

86. "Nowhere is the layman's criticism and the cry, 'kill all the lawyers first,' more thoroughly justified." PROSSER § 93, at 595.

87. The "right of privacy" was first delineated in a law review article. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

88. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68, 69 L.R.A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561 (1905); PROSSER § 97; 1 HARPER & JAMES, TORTS § 9.6 (1956).

89. 1 *id.* § 9.6, at 682.

90. PROSSER § 97, at 637.

well illustrated by the appalling decision in *Yoeckel v. Samonig*.⁹¹ In that case, defendant, a man, took a picture of the plaintiff in the women's rest room, and the Wisconsin court denied recovery on the ground that the right of privacy "does not exist in this state."

It is the opinion of the writer that all broadcast defamation should be classified as libel. The libel classification recognizes the immense potential of harm inherent in broadcast defamation. It also recognizes that the interest in reputation is substantial. This interest is probably more important today than it formerly was because of the careful investigations that precede employment, admission to schools, and licensing in the learned professions. Some publishers seem to be unmoved by the increased significance of reputation in the contemporary scene and there seems to be no reason why these persons should be benefited by the arbitrary and anachronistic rules governing slander. A number of opposing arguments have been offered however. It has been said that holding broadcast defamation libellous "does not consider . . . the traditional belief in the veracity of the printed word."⁹² Perhaps there was once a time when the mass of people revered the printed word because of their own illiteracy,⁹³ but it is doubtful that such reverence exists today. It has also been said that holding all broadcast defamation libellous ignores the permanency of form criterion⁹⁴ used to distinguish libel from slander.⁹⁵ But the criteria of permanency of form and magnitude of the harm (or area of dissemination) must be used together in making a determination⁹⁶ and to let the formal one control is to revert to the common law.⁹⁷ It is submitted that Professor Donnelley was correct when he wrote:

The primary reason assigned by the courts from time to time to justify the imposition of broader liability for libel than for slander has been the greater capacity for harm than [*sic*; that] a writing is assumed to have because of the wide range of dissemination made possible by its permanency of form. When account is taken of the vast and far flung audience reached by

91. 272 Wis. 430, 75 N.W.2d 925 (1956).

92. *Summit Hotel Co. v. NBC*, 336 Pa. 182, 199, 8 A.2d 302, 308 (1939).

93. PROSSER § 93, at 585.

94. See text supported by note 35 *supra*.

95. *Locke v. Gibbons*, 164 Misc. 877, 894, 299 N.Y. Supp. 188, 192 (Sup. Ct. 1937); *Summit Hotel Co. v. NBC*, 336 Pa. 182, 199, 8 A.2d 302, 308 (1939).

96. See note 36 *supra*.

97. See text at note 73 *supra*.

No cases have been found which dwelt on the fact that the broadcast was recorded although this fact has been pleaded in at least one case. *Remington v. Bentley*, 88 F. Supp. 166 (S.D.N.Y. 1949). Yet it would seem that if permanency of form were the main criterion, a recording would satisfy it. Cf. *Ostrowe v. Lee*, 256 N.Y. 36, 175 N.E. 505 (1931). It is believed the courts properly ignore technicalities such as recordings and films, however. See Vold, *Defamatory Interpolations in Radio Broadcasts*, 88 U. PA. L. REV. 249, 259-63 (1940).

radio, it is clear that the broadcast of defamatory utterances are as potentially harmful to the defamed person's reputation as a publication by writing. Radio makes available to the defamer a simultaneous audience far greater than that reached by the most permanent of writings. The distinction of permanence between radio and newspaper dissemination seems comparatively irrelevant considered from the standpoint of ultimate distribution of the defamatory material.⁹⁸

If it is objected that this, too, is an arbitrary classification, it can be answered that it at least is based on policy rather than form.

98. Donnelly, *Defamation by Radio: A Reconsideration*, 34 IOWA L. REV. 12, 17-18 (1948).