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Defamation in Broadcasting

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I. *Introduction*

The law of defamation is not new to the world, nor limited to certain nations:

Moses commanded: "Neither shalt thou bear false witness against thy neighbour." The Far East punished slander. The Twelve Tables of Rome recognized defamation. Early Anglo-Saxon and Germanic laws took a serious view of insult by word or gesture. Punishment included excision of the tongue.

In England, a book on libel was written three hundred years ago. Under a French ordinance of the past century the publication of a libel was punished by whipping and on a second offence with death.¹

Obviously, the consequences have changed over the years, but the basic responsibility is still present. The early development of the law of defamation dealt largely with slander, and with libel in a very limited context — mostly in relation to letters and other similar communications. The advent of the printing press and the rise of newspapers saw the law flourish and grow into the large body of doctrine that we know today. The advent of modern means of telecommunication brought the scope of that law to unthought of application in the modern world.

This article will examine the nature of the medium and the application of the centuries old concepts of defamation to radio and television broadcasting. The article is by no means exhaustive, as to cover every aspect of defamation and its application to broadcasting would be a phenomenal task. Instead, several aspects of the law will be examined to see how the courts adapted the old concepts to the new medium and to point out any needed changes in the law. The relevant legislation in the area and the special problems arising in a federal state will be examined, namely the constitutional and conflict of laws problems.

In an effort to keep the paper to a reasonable length, it has been necessary to assume a general understanding of the law in some of the areas discussed. Hence, to a large extent the paper does not

*Keith R. Evans, LL.B. Dalhousie, 1979.

1. A.P. Ashley, *Say It Safely* (4th ed. Seattle: Univ. of Washington Press, 1972) at 4

attempt an indepth study of the law but points out its development in this special field.

II. *The Nature of the Problem*

As stated above, the law of defamation developed in a period when the cases arose from words spoken orally and from words printed, mostly in newspapers and books. Indeed, the law developed two separate sets of principles to deal with each, the first being slander and the second being libel, with substantive differences in the law in each case. The advent of radio, and especially television, destroyed the traditional distinctions between the two. At common law, libel was considered to be the more reprehensible of the two, on the primary basis that it was more permanent in form. However, there was an additional basis in the fact that the written word achieved a much wider distribution.² While the broadcast word may only be with us for a fleeting instant, it does achieve a much more widespread distribution than would a newspaper. In addition, many broadcasts are taped and do achieve a permanent form. Hence, a particular broadcast could have aspects in both branches of the law.

Indeed, the courts themselves had difficulty in deciding whether broadcasts were libel or slander. Some courts held that slander was applicable — as the words were spoken;³ applying historical distinctions without considering the special aspects of the media. Others favoured a law by which the matter constituted libel if it was broadcast while being read from the script and slander if this was not the case.⁴ Still other courts held that a defamatory broadcast was libel.⁵ This confusion alone demonstrates the difficulty of applying the established law to the new form of communication. Legislation in Nova Scotia deems broadcasting of defamatory matter to be libel.⁶

This difficulty must be viewed against the background of the importance of radio and television in Canada today:

Canadians watch television and listen to radio more than any other people on earth. Each week the picture tube and the loud

2. See J. S. Williams, *The Law of Defamation in Canada* (Toronto: Butterworths, 1976) at 55-56

3. *Meldrum v. Australian Broadcasting Co. Ltd.*, [1932] V.L.R. 425 (S.C. Vict.)

4. See C. Gatley, *Gatley on Libel and Slander* (7th ed. London: Sweet and Maxwell Ltd., 1974) at 77

5. *Gearhart v. W.S.A.Z., Inc.* (1957), 150 F. Supp. 98 (U.S.D., Ky.)

6. Defamation Act, R.S.N.S. 1967, c. 72, s.2

speaker occupy their attention for more hours than most of them spend earning a living. Broadcasting is changing their lives with results that will be far reaching for them and their country.⁷

This addiction to the broadcasting media should be considered by the courts in their application of the law to radio and television. Canadians have become addicts to television and this must shape their public attitudes — to social life, recreation, and opinions on public men and our political institutions. Television and the portrayals given thereon, can create an intense reaction among the viewers. The law must be able to meet this effect in relation to defamation actions.

In fact, the law may need to go further and even make a distinction between radio and television. Radio does not have the same number of listeners as does T.V., nor will it generally be able to obtain the same intense reaction or feeling of involvement that television can achieve. The added effect of the visual image can be of immense importance in this regard.

There are several other aspects in which distinctions can be made between traditional means of communication and the broadcast media. In addition to the fact that broadcasting has the ability to reach many more people simultaneously, it has the ability to span borders very easily and hence, people may be affected in various provinces and even in various states. While not strictly related to defamation law, it is another problem which will be facing the courts.

The nature of the broadcast medium places the publisher in a special field. In a newspaper, the editor has the opportunity to screen all the material very closely. The broadcaster has not the same opportunity. A disc-jockey may make an off-hand, ad-lib remark, a caller on a talk-back show may make a defamatory statement, or a person in a crowd may hold up a defamatory sign during broadcast of a live demonstration. The opportunity to carefully screen such remarks is just not present. To what extent will the courts hold the broadcaster, the publisher (licensee), or the employer liable? Again, special consideration should be given to the nature of the medium.

To conclude, therefore, it is conceivable that the courts should set different standards and rules for, and even within, the broadcasting media. There are indications that courts are willing to set special

7. D. Jamieson, *The Troubled Air* (Fredericton: Brunswick Press, 1966) at 9

rules where policy requires. For instance, the courts in the United States had ruled that publishers were protected in situations where they discussed public officials and that in order to sue for defamation, such public officials had to show malice (knowledge of falsity or reckless disregard as to truth) on the part of the publisher. However, they were willing to set different standards in regard to private individuals, as they did not place themselves before the public, nor did they have the same access to the media as did a public official to rebut the statements. Hence, the states could set special standards.⁸ The next part of this article will examine specific aspects of the law of defamation, the need for special rules and the willingness of the courts to set those separate standards.

III. *Some Selected Topics*

1. *Pleadings*

The rules of pleadings in a defamation action were developed many years ago and are fairly strict. It was necessary to set out the exact words complained of in order for the defendant to know what the case was that he had to meet. The reason for this strict rule was of course that in such actions everything depended on the words, so they should be set out expressly.⁹ Generally, as well, only the particular parts of the material complained of were to be specified, and a claim would be struck out as embarrassing if the whole of an article was set out and only part of it was relevant to the case.¹⁰ The only time when this did not apply was when the whole of the article was said to be defamatory,¹¹ but even here, it appears that the effect of the material must be set out and the material must not be too long.¹²

The difficulty arises in applying these rules to the broadcasting media. The problem arose early in the United States and the courts dealt with the problem by saying that the pleadings were satisfactory if a factual description of the show and the conclusions of fact were

8. See M. J. Laughlen, "New Standards in Media Defamation Cases: *Gerty v. Robert Welsh, Inc.*," (1975-76), 12 Cal. Western L. Rev. 172

9. *Harris v. Warre* (1879), 4 Comm. Pl. 125

10. *D.D.S.A. Pharmaceuticals Ltd. v. Times Newspapers Ltd. and Another*, [1972] 3 All E.R. 417 (C.A.)

11. *Churchill Forest Industries (Manitoba) Ltd. v. Finkel Bodie et al.*, [1971] 1 W.W.R. 745 (Man. C.A.)

12. See Comments on *Churchill* case in *Lougheed v. Canadian Corporation* (1978), 4 C.C.L.T. 287 (Alta. S.C., App.Div.)

set out, together with statements of the way in which the material was defamatory.¹³ The Canadian approach was recently stated in the *Lougheed* case,¹⁴ in a rare display of judicial recognition of the unique character of the medium in the field of defamation.¹⁵ This was an application for further particulars, by the C.B.C., in the claim against it by the Premier of Alberta. The C.B.C. had aired a show in which the Alberta Sincruide deal was the topic. It was founded on a factual background of actual events and people and the actor portraying the role of the Premier used Lougheed's own name. The learned trial judge first analyzed the rule as it stood and the nature of the television media. He went on to outline the two major difficulties confronting the court. On the one hand, was the difficulty, due to technological developments in audio-visual presentations, to give a complete description of all the alleged defamatory elements involved in an hour long play on T.V., while on the other, was the need to clearly delineate what the claim was to enable the defendant to present a defense. Broad general allegations were not enough and the court set out the following rules:

I would therefore hold that the plaintiff, in this case, must go beyond general allegations of the type that the television play portrayed him as having been "outmanoeuvred, outsmarted and outnegotiated by major corporations". The plaintiff must also give some indication of what scenes are the basis of these allegations. This is not to say that the plaintiff must go into painstaking detail of each picture and sound making up the scene. However, he must indicate to the defendant which parts of this television play he alleges defame him.

If the plaintiff is relying upon the method portrayal of him by the actor in the play as being defamatory or contributing to the alleged defamatory image, he should specify what specific methods are involved.

If the plaintiff relies upon any innuendo arising out of the play, again he should specify what, in his opinion is the alleged innuendo . . .

If the plaintiff intends to rely upon any impression created by the background music, . . . he should be able to specify what there is about the music that creates or helps to create the alleged defamation.¹⁶

13. *Brown v. Paramount Publix Corporation* (1934), 270 N.Y.S. 544 (Sup.Ct.App. Div. 3rd Dep't.)

14. *Lougheed v. Canadian Broadcasting Corporation* (1978), 4 C.C.L.T. 287 (Alta. S.C.)

15. See quote from case, *infra*, note 49

16. *Lougheed v. Canadian Broadcasting Corporation*, *supra*, note 14 at 309. The

The court has then, out of necessity, relaxed the rather strict rules of pleading in relation to broadcasting and has set a separate rule for the medium. This recognition of the special nature of radio, and especially television, may be reflected in later cases in different areas.

2. Injunctions

While it is clear that once libel is established in court, there is jurisdiction to grant an injunction to prohibit further publication¹⁷ unless there is no danger of recurrence,¹⁸ What is the situation where a claimant seeks an injunction to prevent the initial publication of material which he alleges to be defamatory? The leading case on this was *Bonnard v. Perryman*,¹⁹ the ruling of which was set out and applied in relation to the broadcasting media in *Canada Metal Co. Ltd. et al. v. Canadian Broadcasting Corporation et. al.* as follows:

The Court in a case of this type will only interfere with a publication of an alleged libel in the very clearest of cases. The Court must be satisfied that the words are beyond doubt defamatory, are clearly untrue so that no defense of justification would succeed and, where such a defense may apply, are not fair comment on true or admitted facts.²⁰

Hence, an interlocutory injunction of this nature would only issue where the court would set aside the verdict of no libel returned by the jury as being unreasonable. Where a defense is raised and it is not manifest that the defense is bound to fail, the injunction will be refused.²¹

Two reasons are traditionally given for such a strict rule to be

law in relation to innuendo has been that, as material could have many different meanings, the statement of claim should set out the innuendos claimed. (*DDSA Pharmaceuticals, supra*, note 10). The English Court of Appeal, however, seems to have relaxed the rule somewhat, as they recently stated that if no innuendo was set out, the court could outline the various meanings a jury might reasonably put upon the words. (*London Computer Operators Training Ltd. and Others v. British Broadcasting Corporation and Others*, [1937] 1 W.L.R. 424 (C.A.)). The quote above seems to stick with the stricter rule. Here, the innuendo appeared to be that repeated references to the U.S. Watergate scandal throughout the show imputed a similar wrongdoing here.

17. *Hayward & Co. v. Hayward & Sons* (1886), 34 Ch. D. 198

18. *Pryce and Sons Limited v. Pioneer Press Limited* (1923), 42 T.L.R. 29 (K.B.D.)

19. [1891] 2 Ch. 269 (C.A.)

20. (1974), 3 O.R. (2d) 1 at 16 (H.C.)

21. *Fraser v. Evans*, [1969] 1 All E.R. 8 (C.A.)

applied. The first is that the courts show a strong desire not to interfere with the basis of the Anglo-Canadian democratic system — the Sacrosanct principle of freedom of speech. The second is that the court, in dealing with an interlocutory matter, does not like to usurp, in advance, the function of the ultimate tribunal in deciding the case.²²

Compare the approach at common law with the approach of the Scottish courts on an application for interim interdict. In considering the policy behind the law, a recent case quoted Lindley, L.J. in another case:

I do not doubt that it is right when the evidence and facts warrant it to exercise that jurisdiction, even upon an interlocutory application, because prevention is better than cure, and an injunction to stop the publication of libel is a great deal better than an action of damages in consequence of its publication.²³

The test to warrant such an interference was then stated to be:

But I think the matter must be judged from the point of view of whether there is a prima facie case alleged, and, if there is, then the question can be resolved by the test of the balance of convenience.²⁴

Clearly, it is much easier to meet the test here than it is to meet the common law test. It was pointed out, however, that under the law of Scotland, no evidence was given in an application for interim interdict, as the court relied on averments and statements at the bar. Hence, it would be difficult to say whether a particular applicant would be bound to succeed upon the case — the common law test.

It must be noted that the common law rules developed at a time when the majority of matters coming to the court were in printed form. The *Bonnard*²⁵ case dealt with matters published in a financial newspaper and the other leading case dealt with publication in form of trade circulars.²⁶ Clearly these types of materials would not achieve the distribution of modern shows broadcast on radio and T.V. Nor could the printed word convey the meaning, as well, of the spoken word with its tone and inflection, or of the visual image. It would be much easier for the court to

22. Gt. Brit. *Report of the Committee on Defamation* (London: Her Majesty's Stationery Office, 1975)

23. *Boyd v. British Broadcasting Corporation*, [1969] S.L.T. 17 (Sh. Ct.)

24. *Id.* at 18

25. *Bonnard v. Perryman*, *supra*, note 19

26. *William Coulson and Sons v. James Coulson and Co.* (1876), 3 T.L.R. 846 (C.A.)

examine the printed word to say the action was bound to succeed. Yet, the *Canada Metal*²⁷ case applied the age old authority without any consideration of change in the technology of the publication. I think this is clearly too strict an application of the rule to modern circumstances.

While freedom of speech is beyond reproach, should not this be balanced by a freedom of the individual to have his reputations protected in appropriate cases? As the court said in the *Boyd*²⁸ case, the granting of the injunction would result in a temporary inconvenience for the defendant — a mere delay in broadcasting the film — while failure to grant it could result in great damage to the plaintiff. Surely there is no better place to apply the maxim “an ounce of prevention is worth a pound of cure”. The British Committee on Defamation refused to recommend any change in the common law in this regard, as no one had made any adverse comments on the matter.²⁹ With all due respect, I feel that the Scottish approach is much more just and can protect both freedom of speech and the rights of the individual. This would be especially appropriate to the broadcasting media due to their unique characteristics and the potential for harm. Indeed, the defendant is protected to some extent in both the common law and under the Scottish law. If an interlocutory injunction, or interim interdict, has issued, and the plaintiff is not successful on the subsequent disposition of the case, he will be responsible for any damages resulting from the issuing of the injunction.³⁰

3. *Innocent Dissemination — Due Diligence*

Television and radio shows are often broadcast live. As a result, such a publisher has little or no opportunity to carefully review material not included in script form. People may make ad-lib remarks and a person may flash a defamatory sign as a camera sweeps a crowd of people. The law in this regard is well summarized by the British Committee on Defamation:

298. At present a broadcasting company is liable for all material broadcast or televised on its network, whether scripted or live, whether it is a studio or an outside broadcast. Consequently, they

27. *Canada Metal Co. Ltd. et al. v. Canada Broadcasting Corporation et al.*, *supra*, note 20

28. *Boyd v. British Broadcasting Corporation*, *supra*, note 23

29. Gt. Brit. *Report of the Committee on Defamation*, *supra*, note 22

30. *Id* at 87 and 88

may incur liability for completely unexpected and unforeseeable defamatory statements such as for example, a derogatory remark made by a contributor in a live studio discussion, or banner or leaflet thrust before the television camera in a live transmission of a political meeting or demonstration.³¹

This application stems from the strict approach to defamation taken by courts in the past. It is the making of the statement which is wrong, not, in fact, how it is made:

He has none the less imputed something disgraceful and has none the less injured the plaintiff. A man in good faith may publish a libel believing it to be true, and it may be found by the jury that he acted in good faith believing it to be true, and reasonably believing it to be true, but that in fact the statement is false. Under these circumstances he has no defense to the action, however excellent his intention.³²

This idea stems back into history, as it is said “. . . the same answer suffices, that the action is not maintainable upon the ground of the malignity, but for the damage sustained.”³³ Hence, it appears that the law of defamation approaches a strict liability test.

Relief was provided in two very narrow areas of the law. The first is the defense of innocent dissemination, outlined by Romer, L.J. as follows:

The result of the cases is I think that, as regards the person who is not the printer or the first or main publisher of a work which contains a libel, but has only taken, what I may call, a subordinate part in disseminating it, in considering whether there has been publication of it by him, the particular circumstances under which he disseminated the work must be considered. If he did it in the ordinary way of his business, the nature of the business and the way in which it was conducted must be looked at; and, if he succeeds in showing (1) that he was innocent of any knowledge of the libel contained in the work disseminated by him, (2) that there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have lead him to suppose that it contained a libel, and (3) that, when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained a libel, then, although the dissemination of the work by him was prima facie publication of it, he may nevertheless, on proof of the before — mentioned facts, be held not to have published it. But onus of proving such facts lies on him . . .³⁴

31. *Id.* at 82

32. *E. Hulton & Co. v. Jones*, [1910] A.C. 20 at 23-24 (H.L.)

33. *Thorley v. Lord Kerry* (1812), 4 Taunt. 355; 128 E.R. 367 (Comm.Pl.)

34. *Vizetelly v. Mudie's Select Library, Limited*, [1900] 2 Q.B. 170 (C.A.)

This idea was originally developed to cover messengers and carriers. While this was adopted in Canada, it must be pointed out that this defense is very narrow. It applies mostly to vendors of newspapers and booksellers,³⁵ and I have found no case where it has applied to a television or radio broadcast. If an individual station attempted to use the defense it would be confronted with two arguments — that they were a first or even main publisher of the work, and that their affiliation with network would remove the availability of the defense, a circumstance attributing knowledge of contents to the station.

Another narrow defense is that of accidental publication. This applies in such cases where a letter addressed to one person is opened and read by another.³⁶ However, this has really no application to the field of broadcasting, as there the intent to publish generally to an audience is always present.

The application of the strict rule can have particularly hard consequences in the field of broadcasting. As outlined in the two examples at the beginning of this section, the T.V. editor will often have no opportunity to prevent the publication of defamatory material. The first area of broadcasting to encounter the problem was the ever popular open line radio programmes. The problem was met somewhat through the technology that was used. Conversations were taped and replayed seconds later as a control device. Yet, this, by itself, only allows for the very quickest of editing and does not subject itself to the meticulous editing available in relation to the printed word, nor are such methods adaptable to all fields of broadcasting. Surely the public interest in such shows is not disputed, and yet the strict rules will apply. This may be acceptable if you see the station as being better able to bear the risk, and perhaps to insure against it, but shouldn't some aspect of fairness and justice apply? One would expect that the station could recover on open line programmes from the caller making the defamatory remarks. But perhaps it would be better to set some guidelines in legislation.

It is useful on this aspect to examine the developments in jurisdictions south of our border. The basic rule in the United States, which is still law in some states, is similar to the Anglo-Canadian rule. The real question was not at whom the article

35. *Newton v. City of Vancouver et al.* (1932), 46 B.C.R. 67 (B.C.S.C.). See also, *supra*, note 22 at 81

36. *Huth v. Huth*, [1915] 3 K.B. 32 (C.A.)

was aimed, or with what intent, but was who did it injure.³⁷ The strict rule even applied in situations where the station was obliged to give a person running for election equal time to that of his opponent. In *Sorenson v. Wood et. al.*,³⁸ in an action brought against the station for words spoken during such time by a candidate against the other candidate, the station claimed as a defense that the legislation prohibited censorship of any kind and that therefore, they should not be liable. The Court rejected this argument, claiming that only political and partisan censorship was prohibited and that there was no intent by Congress to give freedom to defame. The court rejected the due care attitude adopted in the courts below.

However, a new trend developed in the case of *Summit Hotel Co. v. National Broadcasting Co.*³⁹ The speaker in this case was an employee of a third party to whom the broadcasting company had leased its facilities, using due care in the leasing. The broadcaster could not prevent the transmission, as the remarks were a quick ad-lib interjection by a comedian. The court stated that:

. . .the doctrine of liability without fault has little or no place in torts involving injuries to the person, and its extension from the law of trespass to land has rarely been looked upon favorably in this state.⁴⁰

The court went on to say strict liability should only be extended where there is no other solution as a matter of public policy. The law in Pennsylvania was said to be one of a strict standard of care rather than one of absolute liability. The court went on to say that while there is ample opportunity to proof read and examine printed material to go into newspapers, and to do the same with scripts of T.V. shows, the matter at bar was completely different. One of the main problems in the case law was the adaptation of old law to new areas. The court developed a new rule which would not be too burdensome to the industry and yet protect the public in the following terms:

We therefore conclude that a broadcasting company that leases its time and facilities to another, whose agents carry on the program, is not liable for an interjected defamatory remark where it appears that it exercised due care in the selection of the lessee, and,

37. *Rimmer v. Chadron Printing Co.* (1953), 56 N.W. 2d 806 (Neb. Sup. Ct.); *Greer v. Skyway Broadcasting Company* (1962), 124 S.E. (2d) 98 (N.C. Sup. Ct.) 38. (1932), 243 N.W. 82 (Neb. Sup. Ct.)

39. (1939), 8 A.2d 302 (Penn.Sup.Ct.); See also *Kelly v. Hoffman et al.* (1948), 61 A. 2d 143 (N.J.Ct.Err. & App.)

40. *Summit Hotel, id.* at 306

having inspected and edited the script, had no reason to believe that an extemporaneous defamatory remark would be made. Where the broadcasting station's employee or agent makes the defamatory remark, it is liable, unless the remarks are privileged and there is no malice.⁴¹

It has been claimed that the station should have corrected the remark during the rest of the show. This idea was rejected, as they were not liable for the remark, so why should they apologize. As well, such action would only emphasize the remark and make the situation worse.

The approach was adopted by the courts in several other states, although some seemed to confuse the strict rule with the new approach.⁴² Paul Ashley, in his book,⁴³ states that over forty state legislatures adopted a rule similar to the above judgement, making stations liable only if they failed to exercise due care to prevent the publication.⁴⁴ This was a question of fact for the jury. Some States, he says, went as far as protecting a station broadcasting a network programme if it was not the station of origin. The provisions for due care, however, will not apply where the defendant station itself published false and untrue material.⁴⁵

While the approach outlined in the *Summit Hotel* case,⁴⁶ is extremely limited, it must be noted that it is a judicial recognition of the unique nature of the broadcasting industry. As such, it would be open to Canadian Courts to follow and develop. However, in view of the statement made by the Committee on Defamation with which this section began, it is unlikely that the courts will make such a development on their own. If they did, however, they need not restrict themselves to the narrow limits outlined in *Summit Hotel*.

41. *Id.* at 312

42. *Gearhart v. W.S.A.Z., Inc.*, *supra*, footnote 5

43. *Supra*, note 1

44. See for example Mich. Comp. Laws. 1948, 484.331:

Sec. 1. The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, by one other than such owner, licensee or operator, or agent or employee thereof, unless it shall be alleged and proved by the complaining party that such owner, licensee, operator or such agent or employee has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast. P.A. 1951, No. 221, 1, Eff. Sept. 28

45. *Gendusa v. Mid-Continent Telecasting, Inc.* (1964), 397 F.2d. (Kan. Sup. Ct.)

46. *Supra*, note 39

The policy outlined above by the decision could well lead to an expansion of the idea to allow a due diligence test in areas where a sign is held up in a crowd and for ad-lib remarks by a person on a show being broadcast live by the broadcaster itself.

If the development here depends on legislative change, the prospects are not good. The British Committee refused to recommend any change in the law in the area and cited four reasons therefore.⁴⁷ 1) Such matters may be considered in mitigation of damages; 2) Difficulty of plaintiff to recover otherwise 3) Wide circulation of the media should result in a strict test, and, 4) No evidence of a large number of claims in this area. These reasons all appear to be valid policy considerations. However the heavy disadvantage to the industry in some areas, such as the sign in the crowd situation, might appear very unjust, so perhaps some minor form of due diligence test might be implemented. And, as pointed out above, the courts alone have the capacity to do so, if they will consider the policy behind the law and the special aspects of the media.

4. *News Services*

One area which has special significance here is the receipt of news items by T.V. stations from news services. The importance of receiving accurate facts from such services would be very important to T.V. stations. This is one of the few areas in Canada which has seen litigation in the field of defamation in broadcasting. In a very encouraging judgement, recognizing the situation and the aspects of the medium, the Ontario High Court of Justice said:

The public mischief which could arise therefrom cannot be measured. For, in this electronic age, it has become the evening pastime of millions of Canadians to view the 11:00 o'clock news before retiring. Such broadcasts are seen and heard even by the illiterate. Most viewers come to rely on the correctness of the facts as broadcast. Thus, there must be a safeguard to ensure that the television media which simultaneously reaches out to people in all regions throughout Canada, broadcasts accurate facts.⁴⁸

Here, the T.V. Company was successfully sued for libel in relation to a news item it carried. It sought recovery of part of the damages against the third party, the supplier of the news item. The court held

47. *Supra*, note 22 at 82

48. *Allan v. Bushwell T.V. Co. Ltd., Broadcast News Ltd., Third Party*, [1969] 1 O.R. 107 (H.C.J.)

that under the contract between the supplier and the station, there was an implied condition that the news would be reasonably fit for transmission — *i.e.* accurate — if 1) the station relies on the skill and judgement of the news service and 2) the news service knows it will be broadcast verbatim or in an edited form. If the material supplied is defamatory, there is a breach of a condition of the contract, and it being a fundamental one, no exemption clause applies. The T.V. company, cannot however, recover for any part of the damage for that portion of the award which was aggravated by its editing. This is an important development for broadcasters.

5. *Fair Comment*

There is a defence to a defamation action called the defence of fair comment. Gately outlines the defence as follows:

To succeed in a defence of fair comment, words complained of must be shown to be:

- 1) Comment
- 2) Fair comment
- 3) Fair Comment on some matter of public interest.⁴⁹

The reason why this topic is discussed in this paper is the interest raised by the *Lougheed* case.⁵⁰ The ability of a visual portrayal to convey other meanings, for words to convey something by a different tone, for the media to broadcast fiction in the form of a documentary and even to make-up someone to portray a person in such a way as to physically resemble a real person, all have an affect on fair comment. The Alberta Supreme Court, in dealing with an interlocutory application on a different matter, put it well when it said:

The vehicle which published the alleged defamation in this case is a play broadcast over a television network. A television play typically presents a story to the viewing audience by a combination of spoken words, the manner and craft of the actors portraying the various characters in the play, the sets and costumes and, even in some cases, by the use of special effects such as background music. In this medium it is quite possible that the words themselves spoken by the actors do not convey a defamatory meaning but the manner in which the words are spoken or the gestures of the actor speaking them may convey an entirely different impression to the viewing public.⁵¹

49. *Gately on Libel and Slander, supra*, note 4 at 293-294

50. *Supra*, note 14

51. *Id.* at 297

The danger here, in relation to the defense, is the confusion of fact and comment, and the portrayal of comment as fact.

The common law appears to provide protection in this regard:

But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticize, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct.⁵²

The distinction is clearly drawn by Lord Justice Fletcher Moulton . . . “Comment in order to be justifiable must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish what is report and what is comment.”⁵³ “Any matter, therefore, which does not indicate with reasonable clearness that it purports to be a comment, and not statement of fact, cannot be protected by the plea of fair comment.”⁵⁴ The Lord Justice suggested that the reason for the approach was that injustice is prevented if the reader can clearly see the facts from which the person commenting draws his inference. If the facts are stated clearly, the reader can draw his own inference. By confusing fact and comment, the reader would assume that the presentation had been based on reasonable grounds. The learned judge in *Mitchell v. Times Publishing Co.*⁵⁵ suggested that the defense would thus not apply where a reasonable man could not distinguish between fact and comment.

The above seems quite clear and should apply *a fortiori* to a situation in which visual images are presented. The above authorities all relate to written material where the reader has the words before him and can re-examine them carefully at his will to distinguish between what is fact and what is comment. The same opportunity is not present when the material is but a fleeting glimpse of visual material upon a television screen. However, the distinction above has often been blurred.

In *Sheppard v. Bulletin*,⁵⁶ the court seems to suggest that all that

52. *Davis & Sons v. Shepstone* (1886), 11 App. Cas. 187

53. *Hunt v. The Star Newspaper Company, Ltd.*, [1908] 2 K.B. 304 at 319 (C.A.)

54. *Id.* at 320

55. [1944] 1 W.W.R. 400 (B.C.S.C.); (*Sub. nom. Mitchell v. Victoria Daily News*, [1944] 2 D.L.R. 239 (B.C.S.C.))

56. (1916), 27 D.L.R. 526 (Alta. S.C.). This case was reversed on other grounds in (1917), 55 S.C.R. 454

is required for a statement to qualify as comment is that it be accompanied by other facts, that it refer back to those facts, and that the comment be reasonably based on those facts. At first glance, the decision of the Alberta court seems contrary to the authority above. However, upon close examination, the learned judge appears to have confused the proper test to be applied. He uses language akin to that used in deciding whether a certain comment exceeds the bounds of fair comment and not whether it was comment portrayed as fact in the first instance. This is a very common error in this field.

The difference can be seen in the latitude given by the courts in finding that once something is comment, that it is within the bounds of fair comment. All that is required here is that the comment relate to true fact and be an honest opinion.⁵⁷ This relates back to the very *broad test* here, enunciated by Lord Esher:

What is the meaning of 'fair comment'? I think the meaning is this: is the article in the opinion of the jury that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question? Every latitude must be given to opinion and to prejudice.⁵⁸

However, that is a very different test relating to a different question.

Once this confusion has been eliminated, there is authority to allow relief in the area of fair comment in broadcasting due to the obvious susceptibility of confusion of fact and comment on the medium. The case came up for decision in *Bartrop v. Canadian Broadcasting Corporation*,⁵⁹ and the court took the authority that was available for it. In this view, a physician had received \$1,000 a day plus expenses while appearing for a manufacturer on hearings into alleged lead pollution by the companies. In a C.B.C. radio programme, that physician was said to be an example of an expert hired to give an opinion favourable to the interests paying him. They implied that the physician was dishonest and he sued. The Court reaffirmed the old authority:

To be comment, fair or unfair, a statement must be a statement of opinion and not a statement of fact. It must be an expression of opinion about facts which must have been presented to the readers or listeners, or be well known to them, and which themselves be substantially true. Such comment, with such a base, may then be excused even though it is defamatory, if it was

57. *Slim and Others v. Daily Telegraph Ltd. and Others*, [1968] 2 Q.B.D. 157 (C.A.)

58. *Merivale v. Carson* (1887), 20 Q.B.D. 215 at 280 (C.A.)

59. (1978), 25 N.S.R. (2d) 637 (N.S.S.C. App.Div.)

a fair and honest expression of opinion on a matter of public interest.⁶⁰

In this case, the defense failed because:

. . . the words found defamatory in meaning and by innuendo are, in my opinion, not comment but false statements of fact. . . . The remaining remarks state or imply as a *fact* that Dr. Barltrop for a price has given false or misleading evidence with unethical disregard for the health of the public. They assert as a fact that he was professionally dishonest. They are therefore not mere expressions of opinion, such as might have been the case had the accusers set faith substantially true facts from which dishonesty might fairly be inferred and had then expressed their opinion that they thought he was dishonest.⁶¹

While this case did not deal with the special aspects of the medium which lend themselves to achieving greater confusion of fact and comment, the clear distinction between the two issues involved *i.e.* fact v. comment and comment v. bounds of fair comment, augers well for a future case which will deal with the issue.

Before leaving this area, it is worth noting one aspect of the law in which the United States has acted but Canada has not. In the U.S., if a person is attacked and the matter is a controversy of public importance, that person must be notified by the broadcaster (licensee), and a tape or transcript of the remarks must be provided. As well, he must be given a reasonable opportunity to respond. This doctrine of fairness is included in Federal Government Regulations. In Canada, there is no such requirement, and a station need not even supply its tapes upon request — although many do. This is one area where legislative reform is perhaps needed.⁶²

6. *Parliamentary Privilege*

The privilege attached to words spoken in Parliament applies to the broadcasting industry in two respects. The first, of course, is the broadcasting of news reports about proceedings in the House. A very good recent case on the issue was *Cook v. Alexander and Others*.⁶³ Under this authority, a summary or précis of Parliamentary proceedings are privileged if it is a fair and honest report of

60. *Id.* at 657

61. *Id.* at 659-660

62. For a discussion on the area generally, see Levy, "Open Line Radio Programs and the Law" (1969), 1 Can. Comm. L.R. 160

63. [1973] 3 W.L.R. 617 (C.A.); see also *Wason v. Walter (1868)*, L.R. 4 Q.B. 73

what took place, on the policy ground that people should know what goes on in Parliament. There is a qualified privilege in the reporter, as long as he is not activated by malice. In addition, the reporter can then proceed to make fair comment on the matters. This also applies to a sketch of the proceedings in newspapers — this being a selection of interesting parts of the proceedings of special public interest and description thereon. It is privileged as long as it is fairly and honestly made with the intention of giving an impression of the impact made on the hearers. There is no reason for any different application of these principles to news reports on the broadcast media.

The second area of interest is in relation to live broadcasts of Parliamentary proceedings. Words spoken by a member of Parliament within Parliament are absolutely privileged and once it is determined that the words are spoken in Parliament, the court loses all jurisdiction.⁶⁴ This authority goes as far back as the Bill of Rights.⁶⁵ However this does not apply to matters repeated outside the House and hence did not cover letters posted to a member by the defendant seeking redress.⁶⁶ Nor did it cover a situation where a member submitted a more correct version of his speech to a newspaper.⁶⁷ The fact that the proceeding in the House was deemed not to be libelous did not warrant later distribution through newspapers. If correction was needed, this could be achieved within Parliament and there was no need to resort to the newspapers.

Hence, in order to be privileged absolutely, the statement must be made within Parliament and must not be repeated outside on another occasion. The now live broadcasts from the House have destroyed the initial concept of Parliamentary privilege as the words are now simultaneously broadcast to the living rooms and bedrooms of the nation. However, since the member is speaking within the walls of Parliament and due to the fact that public policy requires total freedom within the House in order to carry on Government, the member would appear to be protected against any action for words spoken on the air from the House on grounds of absolute privilege — there is no cause of action, even in the face of express malice. A case has yet to decide this matter.

64. *Dillon v. Balfour* (1887), 20 L.R. Ir. 600 (Ex. Div.); see *Vezina v. Lacroix* (1936), 40 Que. P.R. 1 (Sup. Ct.)

65. 1 W. & M. Sess. 2, c. 2

66. *Rivlin v. Bilainkin*, [1953] 1 Q.B. 485 (Super. Ct.)

67. *The King v. Creevey* (1813), 1 M. & S. 273; 105 E.R. 102 (K.B.)

But, what of the broadcaster? Is he to be protected on the ground of only qualified privilege or is absolute privilege to apply? With absolute privileges there is no cause of action. In qualified privilege, he is protected only if the broadcast is honestly made and there has been no malice — *i.e.* — not using the occasion honestly for the purpose for which the law gives protection. This is still open for a court to decide and it will have to decide on the policy matters involved. Perhaps the rather rare possibility of having express malice in such a situation may result in having to wait a long time for a decision on the matter.

The British Committee has considered this problem.⁶⁸ They recommended that live sound coverage of Parliamentary proceedings be given absolute privilege and that live picture coverage be given only qualified privilege. The reason for the difference was that in the latter, the editors have the capacity to choose which visual image of several to show — and this could make a difference in the effect conveyed by the words. Malice could enter into such a selection and hence the lesser privilege. We have reached the stage in Canada where we have live coverage of Parliament and yet no thought has been given to this matter in the field of defamation. This is one area where the special nature of the medium deserves special attention. Once again, we will have to wait for the courts to deal with the matter — unless the legislatures decide to act first.

IV. *The Legislation*

There are two legislative enactments which have some bearing on the topic of this paper, one Federal and the other Provincial. To deal first with the Federal legislation, the *Broadcasting Act*⁶⁹ states:

3. It is hereby declared that (c) all persons licensed to carry on broadcasting undertakings have a responsibility for programs they broadcast but the right to freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations is unquestioned:

Thus, besides making the licensees liable for the programmes broadcast, the Federal law leaves the area of defamation in broadcasting open to the generally applicable law, and makes no special rules. The only other reference within the Federal Act which remotely approaches the topic is as follows: in s. 3(d):

68. Gt. Brit. *Report of the Committee on Defamation*, *supra*, note 22 at 56

69. *Broadcasting Act*, R.S.C. 1970, c. B-11

The programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern, and the programming provided by each broadcaster should be of high standard, using predominantly Canadian creative and other sources.⁷⁰

The C.R.T.C. can allocate time for the purposes under s.16 (1) (i). This is the closest that Canadian law comes to the fairness doctrine present in the United States, as outlined above. However there are no set requirements to allow a reply by a defamed person and the general provisions above will be of very little assistance to him.

The bulk of applicable legislation in the field is covered by the Defamation Act.⁷¹ By s.2 of the Act, broadcasting of words (including visual images) is treated as publication in permanent form and is therefore libel. One significant aspect of the Act is contained in s.4 — which allows the defendant to give evidence, in mitigation of damages, proof that he published an apology for the defamation before the action commenced, or as soon after commencement as he had an opportunity where the action has commenced quickly. The law of what constitutes an apology is well set out as follows:

The defendant should admit the charge was unfounded, that it was made without proper information, under an entire misapprehension of the real facts, *etc.*, and that he regrets that it was published in his paper. Merely to say that you are sorry may mean that you are sorry because you have laid yourself open to an action, not that you repent having inflicted an unmerited wrong. . . . The most proper apology cannot undo the irretrievable publication and dissemination of the slander, nor be regarded as complete restitution, though it may properly be considered in damages.⁷²

The same law applies to libel on the broadcasting medium and demonstrates that the apology must be fairly complete and definite. As well, an apology under the Act is personal to the person making it, and a radio show host may not be covered by the apology of the station.⁷³ This ability to apologize can be a powerful defense to a

70. *Id.*

71. Defamation Act, R.S.N.S. 1967, c. 72. Most other provinces have very similar legislation.

72. *Thompson v. N.L. Broadcasting Ltd. and Pitz (Harrison)* (1976), 1 C.C.L.T. 278 (B.C.S.C.), citing *Haste v. Victorian Times Publishing Company* (1889), 1 B.C.R. 365 (S.C.)

73. *Fritz et al. Realescope Realty Ltd. and Pacific Rim Equities Corp. v. Jim Pattison Broadcasting Ltd., Murphy and McKilka*, [1976] W.W.D. 180 (B.C.S.C.)

broadcasting company and lessens the need for a due diligence requirement under Canadian law.

S.9 of the Act goes on to broaden the defense of fair comment to a slight extent, saying that as long as the comment is fair the defense will not fail merely because truth of every allegation of fact cannot be shown. This should not affect, however, the situation where fact and comment are so mixed as to be indistinguishable, and the other rules, discussed above, apply.

S.12 (1) (a) maintains a qualified privilege for fair and accurate reports of Parliamentary proceedings. Without further legislative change, this would probably apply to give only qualified privilege to live sound broadcasts. However, in a rare display of advancement in the field, s.12 (6) (b) says the 12 (1) (a) does not apply if the plaintiff shows that the defendant was requested to broadcast a reasonable statement of explanation or contradiction by the plaintiff and refused. Such statement would have to be broadcast on at least two occasions on different days at the same time as the alleged defamatory matter was broadcast. Hence, in areas of qualified privilege of public proceedings, there is an aspect of the "fairness" doctrine present in Nova Scotia.

Section 15 (1) allows an offer of amends to be a defense where there has been an "innocent" publication of the matter. This is narrowly defined under s. 15 (5) to cover only situations where there was no intent to publish the words as applying to that person, the words were not defamatory on their face and the publisher did not know of the circumstances which made them defamatory of the plaintiff and had exercised all reasonable care in relation to the publication. This is hardly a radical relaxation of the absolute liability for defamatory statements.

Perhaps one of the best benefits of the Act are the strict time limits imposed for action. The plaintiff must give broadcaster fourteen days written notice of intent to bring an action within three months after the publication of the matter has come to his attention (under s.17 (1)), and the action must be commenced within six months after the publication has come to his attention (s.18). Certain other relief is provided under s.20, where retraction may be pleaded in mitigation of damage, and s.21 where only special damages are available in certain circumstances.

In general, therefore, while the Nova Scotia Act cannot claim to deal totally with the problems raised in Part III, some relief is provided in the apology and time limit aspects. However,

improvement is still needed in areas such as injunctions, due care, parliamentary privilege and other matters.

Before closing, it might be useful here, to show the deficiency of the legislation, to examine the particular problem of cable television. This type of technology is not covered by the definition of broadcasting in s.1 (a) of the Nova Scotia Act and hence any defamatory publication is left totally to the common law. One significant aspect here is that the shorter time limitations of the Act would not apply. Such an omission is simply due to the advances of technology occurring more rapidly than the legislators can consider them. Due to the fact that cable television networks are expected to give access to groups who do not have access to traditional outlets, the danger of defamation may be even greater. And indeed, the need for change in the law may be greater, as for instance in the due care cases. One group recommended:

The Act should be amended to protect a cable television company which provides its technical facilities to a community group, but has not control over nonpersonnel involved in the content of the program, always provided that an announcement to this effect is made before each such program, or, in the case of continuous transmissions, at regular intervals.⁷⁴

V. *The Constitutional Problem*

In the event that one decides the law as it presently stands does require change, the problem to be faced is complicated by the federal system present in Canada. Which level of government has the legislative competence to enact the needed changes? In an article dealing with cable television systems, the following comment was made (hereinafter referred to as the cable T.V. quote):

Although federal jurisdiction over broadcasting has been termed "exclusive", it is generally thought that defamation legislation at the provincial level is applicable to broadcasting stations so long as such legislation is aimed at the news media generally (e.g. both newspapers and broadcasting stations) as in fact is the case. Defamation legislation as such is of course a provincial responsibility under the head "civil rights in the province". Although federal legislation relating to defamation by broadcasting stations would take precedence, no such federal statutes have been passed, and in fact the federal *Broadcasting*

74. Johns, Royce, Shaughnessy and Wiltshire, "Defamation on Cable Television Systems: The Legal and Practical Problems" (1970), 2 Can. Comm. L.R. 15 at 20

Act seems to have left specific room for provincial legislation on the subject by the statement in section 3(c) that the “right of free expression is unquestioned, subject only to generally applicable statutes and regulations.”⁷⁵

The statements made above seem rather clear, but legislative competence may not be as clear as is indicated. What follows is a review of the cases in the area and a comparison of possible conclusions with those suggested in the quote.

The basis of federal competence in broadcasting was the decision of the Privy Council in the famous *Radio Reference*.⁷⁶ The question was whether the Federal Government had jurisdiction to regulate radio communication by means of Hertzian waves, including both television and radio signals. The Privy Council held that the matter was exclusively within federal competence on several grounds. The first was the power to implement Canadian treaties under the peace, order and good government clause. This application of the treaty power was later disapproved, and so need not concern us further. The Court went on to say that there was exclusive jurisdiction under the exception clause in s.92 (10) (a) of the *BNA Act*,⁷⁷ and as a result, had the same effect as if the power were expressly set out in s. 91. Under that exception, the transmissions were either included in the word “telegraph” or were “undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province.” It refused to separate the transmitter and receiver operations, viewing the system as a whole. The Courts went even further in the *CFRB*.⁷⁸ case. The question here was whether the Federal Government had jurisdiction to prohibit the showing of television election campaign advertisements in a Provincial election for a period of 48 hours prior to voting. It had been argued that a distinction should be made between the carrier system itself and the intellectual content of the programmes. The court refused to make such a distinction and held that there was an exclusive jurisdiction in Parliament over content as well — as it covered “the whole of the undertaking of broadcasting.”⁷⁹ They rested their decision on still another ground, that being that

75. *Id.* at 16

76. *Re Regulation and Control of Radio Communications*, [1932] A.C. 304 (P.C.)

77. *British North America Act*, R.S.C. 1970, Appendix II

78. *Re C.F.R.B. and Attorney-General of Canada*, [1973] 3 O.R. 819 (Ont. C.A.)

79. See also: *Re Public Utilities Commission and Victoria Cable-vision* (1965), 51 D.L.R. (2d) 716 (B.C.C.A.); *Public Service Board et al. v. Dionne et al.*, [1978] 2 S.C.R. 191

broadcasting fell within the peace, order, and good government power, since it had attained such dimensions as to affect the body politic of Canada. The mere affectation of provincial powers — *i.e.* provincial elections — did not affect the classification. In a rather sweeping statement, Kelly J.A. had this to say:

While the control of individual persons might be legally accomplished by provincial legislation, the carrier system, being solely under the control and regulation of the parliament, is beyond the reach of provincial legislation.⁸⁰

He went on to say that there was *no* overlapping jurisdiction. Federal regulation of content was also upheld in the *Capital Cities* case at the Supreme Court of Canada level.⁸¹ If the matter stopped here, it would appear that there is no provincial jurisdiction.

However, one vital Supreme Court decision has opened the door. In the *Attorney-General of the Province of Quebec v. Kellogg's Company of Canada and Kellogg's of Canada Limited*,⁸² the Court had occasion to consider Quebec's *Consumer Protection Act* which prohibited the use of cartoon characters in advertising directed toward children. The Government of Quebec sought an injunction against the company and the latter challenged the validity of the law. By a majority, the court rejected the company's submissions and upheld the law. They characterized the issue as one of the control of a commercial enterprise within the province and protection of children against the harmful effects of advertising, both areas being within provincial competence. The mere choice of television as the media could not exempt the company from responsibility. In an interesting comment, Martland, J. said:

A person who caused defamatory material to be published by means of a televised program would not be exempt from liability under provincial law because the means of publication were subject to federal control. Further, he could be enjoined from repeating the publication.⁸³

All may not be lost for provincial regulation of broadcasting a

80. *Re C.F.R.B. and Attorney General of Canada*, [1973] 3 O.R. 819 at 827 (C.A.)

81. *Capital Cities Communication Inc., Taft Broadcasting Company and W.B.E.N., Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141. At p. 162, Laskin C.J.C., said: "Programme content regulation is inseparable from regulating the undertaking through which programs are received and sent on as part of the total enterprise."

82. [1978] 2 S.C.R. 211

83. *Id.* at 225

defamatory statement. In stark contrast on the whole issue were the remarks of Laskin, C.J.C., in dissent:

. . . and the generality of the challenged provincial legislation and regulation does not aid the Province in extending its prohibition of advertising to a medium which is outside of its legislative jurisdiction.⁸⁴

To conclude, therefore, the exclusive federal field may not be so exclusive.

What then is the position in relation to the law of defamation? In the background is the extreme reluctance to split the legislative field of broadcasting in any manner, including content. The cable T.V. quote, however, suggests that if the provincial law has general application, then legislative competence is established. At first glance, this may seem well founded — as laws in relation to defamation would generally fall to the province under s.92 (13) of the *B.N.A. Act*.⁸⁵ As well, the fact that Laskin was in dissent above would bolster the argument. However, upon what grounds may this “generality” suggestion rest? There could be two such grounds. The first is by an analogy to the similar application in the field of company law. In this area, the courts have drawn a distinction between the power to incorporate and the power to regulate, and will allow provincial law of general application to affect federally incorporated companies, as long as they do not impair or sterilize the status or capacity of such companies.⁸⁶ However, this is a special aspect of constitutional law and one should be wary of a general application elsewhere. Perhaps Hogg best describes the situation when he says:

While provincial law of special application to undertakings within federal jurisdiction is not necessarily invalid, it is also true that a provincial law of general application is not necessarily valid in its application to undertakings within federal jurisdiction. Normally, as we have seen, a provincial law of general application which is in relation to a provincial matter may validly affect federal matters as well.⁸⁷

Thus, it is dangerous to apply generalization even within the field of company law, without extending it beyond that field.

84. *Id.* at 215-216

85. R.S.C. 1970, Appendix II

86. *Canadian Indemnity Co. v. Attorney-General of British Columbia*, [1976] 5 W.W.R. 748 (S.C.C.)

87. Peter W. Hogg, *Constitutional Law of Canada* (Toronto: The Carswell Company Limited, 1977) at 83

The second ground is perhaps better. It is the opinion of the writer that this “generality” principle is merely nothing more than an application of determining the pith and substance of an enactment and then allowing an incidental effect upon matters not within the competence of the enacting legislature. The comments by Martland above⁸⁸ would be consistent with this idea in that ‘defamation’ law would be the pith and substance of such law, with a mere incidental effect on broadcasting. And in any event, if one feels that defamatory statements on broadcasting medium deserve special treatment, and that legislative change is needed, the general application, in its literal sense, would not apply. Therefore, one would have to rely on the pith and substance argument.

To elaborate, if broadcasting needs special treatment in the field, the law would not be of the general application suggested in the cable T.V. quote. It would be aimed specifically at broadcasting and would come dangerously close to being within the so-called “exclusion” field of Parliament. If the provinces are to be able to legislate in the area, some other basis is needed. To deal with any legislation in the field, the court would first characterize the law as to its pith and substance, its prime aspect. If found to be dealing in pith and substance with defamation, it would be provincial under s.92 (13); if with broadcasting, it would be federal. However, there is authority for saying that a particular subject matter may have two aspects, giving both Parliament and the legislatures jurisdiction.⁸⁹ Such a law would deal heavily with particular aspects of defamation and could easily be so categorized. If Parliament passed similar laws, it could have equal overtones in relation to broadcasting. The *Kellogg*⁹⁰ case could help the provinces, but it must be noted that the court there refused to deal with the question of what the result would have been if the injunction had been directed to the television station. That question has to be decided here as such a law as is contemplated would apply directly against a broadcaster. It must be noted as well that *Capital Cities*⁹¹ and *C.F.R.B.*⁹² in saying the content was under federal regulation, were dealing with challenges to federal laws. In the case contemplated here, the challenge would be in relation to a provincial law, as was the case in *Kellogg*.

88. See quote, *supra*, note 83

89. *Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.)

90. [1978] 2 S.C.R. 211

91. [1978] 2 S.C.R. 141

92. [1973] 3 O.R. 819 (C.A.)

Hence, it is entirely conceivable that both “aspects” would be valid. As such the laws may overlap where the field is clear.⁹³ But, if there is an inconsistency, the federal law will prevail. This brings to the fore the doctrine of paramountcy, best set out by Hogg as follows:

. . . one must conclude that the cumulative effect of the recent decisions seems to be that the sole test of inconsistency in Canadian Constitutional law is express contradiction. There is no room for any negative implication to be added to the express stipulation of the federal law. This is the course of judicial restraint, allowing the fullest possible play to provincial legislation.⁹⁴

If this is the attitude taken, only where the federal law expressly contradicts a provincial law would the latter prevail. The provincial field would be open to enactment, especially due to the apparent failure by the Federal Government to legislate in the area.

To conclude, federal jurisdiction over broadcasting is well established, both as to the system and the content. There is no dispute, however, over provincial competence in relation to defamation. Due to the need for special rules in relation to defamation on radio and T.V., the “generality” aspect, as mentioned in the T.V. quote, on its literal meaning will not apply to establish provincial competence. It is contended, however, that such special laws could have a dual aspect, vesting authority in both levels of government. Whether this approach is possible is questionable, due to the reluctance of the *Kellogg*⁹⁵ judgement to deal with the situation of what would happen if the T.V. station were directly involved, as would be the case here. If there is a dual aspect, the doctrine of paramountcy of federal legislation would operate, as suggested in the cable T.V. quote, but the narrow application of the doctrine leaves the field open.

Several problems still remain and deserve brief reference. If the dual aspect approach were not accepted and only the federal government could legislate on defamation matters in broadcasting, provincial competence to legislate might still exist in certain areas. While the cases seem to indicate extension of federal control to systems broadcasting totally intraprovincially, some dispute still

93. *Attorney-General for Canada v. Attorney-General for British Columbia*, [1930] A.C. 111 (P.C.)

94. *Supra*, note 87 at 104-110

95. [1978] 2 S.C.R. 211

exists here.⁹⁶ As well, a situation may arise where a cable television station does not receive any Hertzian waves, but broadcasts totally from its own studios. This would not be covered by the existing case law on cable T.V. regulation. Hence, such regulation might be within provincial competence. However, the splitting of such legislative authority is unlikely due to all comments in cases upholding federal jurisdiction. To split the jurisdiction and the law of defamation in the two areas could only lead to chaos and confusion.

If the provinces do have authority, another problem arises. Various provinces could adopt different standards and national broadcasters could have a hard time taking advantage of a special law, due to forum shopping by plaintiffs. In order to protect themselves, as well, due to different standards, a national broadcast would have to conform with the strictest provincial law.

VI. *Jurisdiction and Conflict of Laws*

State boundaries are no barrier to a broadcast. A court may hold that the final act of the broadcast occurred in a receiving set a thousand miles away, rather than in the studio. If a person resident and known in that distant state is defamed or his right of privacy is violated, the law of that state may govern, in the suit against that station.⁹⁷

In Canada, a national broadcast will be seen in ten different provinces, with ten different laws. If provinces bring in special legislation for broadcast defamation, the problem becomes more acute. Where would the suit occur and what law will apply?

The problem of where to sue arose in *Jenner v. Sun Oil Company Limited et. al.*⁹⁸ This was an action to set aside an order to allow the issuance of a writ outside of Ontario, and to allow service on residents of the United States. Alleged defamatory words were broadcast by the defendant radio station, located in the U.S. and heard in Ontario, where the plaintiff resided. The court considered whether it had jurisdiction to hear the case and in order to allow the service outside the province, it was necessary for them to conclude that the tort was committed in Ontario. This latter point is left for discussion later in this part of the paper. In considering whether the court had jurisdiction to hear the case, it was stated that many

96. See Hogg, *supra*, note 87

97. Ashley, *supra*, note 1 at 118

98. [1952] O.R. 240 (Ont. H.C.)

factors must be considered to decide if it was the *forum conveniens*, including those affecting the plaintiff and defendant, and the convenience of both.

In an action for defamation it is a matter of great importance whether the plaintiff is a resident of the locality in which the writ is issued, whether he has a place of business there and whether he seeks to clear his good name of the imputation made against him *in that locality* (emphasis added)⁹⁹

And later in the judgement:

. . . if there is evidence in a particular case that a person had a reputation in this country to be defamed, or was known here, or traded here, or had professional or social connections, it might be that the circulation of a very few copies might do him serious or irreparable harm. It is certainly an element to be taken into consideration. The mere fact by itself of very small circulation, even in a foreign tongue, would not necessarily preclude him from saying that among the people of that nation who read that paper in this country, he would suffer grievously in reputation.¹⁰⁰

Thus some connection of the plaintiff to a province and a defamatory statement published there would give courts of that province jurisdiction to hear the case.

The matter of jurisdiction in matters of tort was recently heard in the Supreme Court of Canada in *Moran et. al. v. Pyle National (Canada) Ltd.*¹⁰¹ In deciding whether the courts of Saskatchewan had jurisdiction to hear a case of a man electrocuted in Saskatchewan as a result of removing a light bulb manufactured in Ontario, the Court said jurisdiction to hear the case depended upon whether or not the tort was committed within the province. Arbitrary rules such as the place of conduct, or place of injury were not to be used in determining the place of the tort. Instead, the real test was that of a substantial connection to the province. Hence, the province substantially affected by the defendant's activities or its consequences would have jurisdiction to hear the case.

. . . where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably

99. *Id.* at 252

100. *Id.* at 253, citing Slessor, L.J. In *Kroch v. Russell et Compagnie Société des Personnes à Responsabilité Limitée*, [1937] 1 All E.R. 725 (C.A.)

101. [1975] 1 S.C.R. 393

foreseeable that the product would be used as consumed where the plaintiffs used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise jurisdiction over that foreign defendant.¹⁰²

The above statement could be easily adapted to cover defamatory statements entering broadcast channels to injure someone resident in another jurisdiction, allowing that latter jurisdiction to hear the case.

Indeed, this fits in well with the earlier decision in *Jenner*.¹⁰³ There would have been indeed a substantial connection with Ontario to allow jurisdiction in that case. Compare the comments of McRuer, C.J.H.C., with the quote above:

Radio broadcasts are made for the purpose of being heard. The programme here in question was put on the air for advertising purposes. It is to be presumed that those who broadcast over a radio network in the English language intend that the messages they broadcast will be heard by large numbers of those who receive radio messages in the English language.¹⁰⁴

The court went on to say that in defamation, it was the publication that gave rise to the action and that therefore the publication in Ontario was a tort committed in Ontario,¹⁰⁵ and therefore there was jurisdiction to allow service outside the province.¹⁰⁶

However, mere jurisdiction to hear the case does not solve the problems that arise. The proper law to be applied by that court remains to be determined.

A province might have the right to take jurisdiction and yet not have the power to change the rules used to identify the legal system under which the rights and liabilities of the parties fall to be determined.¹⁰⁷

No matter what court has jurisdiction, the choice of law should be the same. In the situation where the broadcast originates and is

102. *Id.* at 409

103. [1952] 2 O.R. 240 (H.C.)

104. *Id.* at 249

105. See also: *Coffey v. Midland Broadcasting Co. et al.* (1934), 8 F. Supp. 889 (Dist. Ct. Mo.)

106. Where to sue within the province is dealt with in s.19 of the Defamation Act, R.S.N.S. 1967, c. 72. This is generally the county where the office of the broadcaster is located or where the plaintiff resides. However, upon application of either party, and where the interests of justice require, the court can order a trial to be held in another county.

107. Hertz, "Interprovincial", the Constitution, and the Conflict of Laws" (1976), 26 U. Toronto L.J. 84

received in the same province, there is no problem and the law of that province applies for suits in that province. However, there are two situations in which merely having jurisdiction to try the case does not necessarily also mean that the *lex fori* will apply. The first is a situation where the broadcast was made and published only in another province, and the plaintiff resident in this province takes action here and the local court decides it has jurisdiction. The second is a situation where the broadcast originates in another province, but is published here (and perhaps in other provinces as well). The problems become particularly important if special legislation in relation to defamatory broadcasts have been passed in several provinces, including the province where suit is brought, but where no such law exists where broadcast originated or was made.

The first situation was dealt with by the Supreme Court of Canada in *McLean v. Pettigrew*,¹⁰⁸ a case in which a car accident occurred in Ontario but all the people involved were from Quebec and the action was commenced there. The Court permitted the action to be tried in Quebec because 1) it was actionable under the law of the forum (*i.e.* — there was a cause of action in Quebec if it had occurred there) and 2) it was non-justifiable according to the law of the place where the accident occurred, and therefore punishable there.¹⁰⁹ This adapted the traditional English approach, and in accepting the case of *Machado v. Fontes*,¹¹⁰ the Supreme Court seems to say that once those tests are met, the law of the forum will apply. Thus, in this situation if the *lex fori* has special legislation, it would seem to apply.

However, the *Machado* case has been overruled in England.¹¹¹ The decision in that case, however, is not clear as to what the new test would be. Lord Hodson and Lord Wilberforce overruled the case and would apply the law of the place under the proper law of tort approach as in *Moran*.¹¹² Lords Pearson and Donovan applied the

108. [1945] S.C.R. 62

109. Some cases have satisfied the second requirement by finding criminal punishment would lie, even though on a civil action, there would be justification under the law of the place of the accident. *Brown v. Poland and Emerson Motors Ltd.* (1952), 6 W.W.R. (N.S.(368) Alta. S.C.); *Anderson v. Eric Anderson Radio and T.V. Pty. Ltd.* (1964), 65 S.R. (N.S.W.) 279 (S.C. In Banco)

110. [1897] 2 Q.B. 231 (C.A.). Here, there was an action for libel in Brazil in an English court. In Brazil, the only action would have been criminal proceedings, but the court applied English law and allowed civil recovery.

111. *Chaplin v. Boys*, [1971] A.C. 356 (H.L.)

112. [1975] 1 S.C.R. 393

old law, while Lord Guest overruled *Machado* and decided the case on a very narrow ground. However, both Lords Guest and Donovan stated that the proper law of tort approach had no place in a unitary state, as was the case in Britain. However, Canada is not such a unitary state, so it is possible the law may change in this area. There have been some isolated judgements in support of this new approach in Canada.¹¹³ But until accepted, or rejected by the Supreme Court, the approach taken may be uncertain. If the new approach is accepted, the substantial connection test may apply here to determine not only jurisdiction but also the proper law to apply to the case.

The position under the second situation outlined above is far from clear in Canada, especially where there are special provincial laws. A similar situation arose in *Interprovincial Co-operatives Ltd. et al. v. The Queen in Right of Manitoba*.¹¹⁴ In this case, the defendants, operating in Ontario and Saskatchewan, discharged mercury into waterways which flowed into Manitoba, causing damage to the fishermen of province. Under a Manitoba law, the Government compensated the fishermen, and became an assignee of their rights. As such, the Government sued the defendants for the damage suffered. They relied on a provision of the Manitoba law which said that any lawful excuse in the province of discharge (the defendants were licensed under Saskatchewan and Ontario law to operate their plants) was not a defense to the action in Manitoba.

A whole paper could be written on the implications of this case. In an over-simplification the court was split on the following lines. Pigeon, Martland and Beetz stated that the legislation was directed at acts outside the province and hence was invalid for the extra-territorial effect. Only Parliament could legislate on such a matter, and the rights therefore must be decided under common law. On the same ground, the licenses in Saskatchewan and Ontario could provide no justification outside their own territory. (This would eliminate the need for a choice of law in interprovincial torts, and it is unreasonable to suppose that either Parliament or the Supreme Court would act here to impose special rules.) Ritchie, concurring in the result rejected the above argument, upheld the traditional approach of *McLean*,¹¹⁵ and said that justification in Ontario, in the form of the license, resulted in no action in

113. See Castel, *Conflict of Laws* (4th ed. Toronto: Butterworths, 1978) at c. 13

114. (1975), 53 D.L.R. (3d) 321 (S.C.C.)

115. [1945] S.C.R. 62

Manitoba. Laskin, Spence, and Judson, in the dissent, would have applied the *Moran*¹¹⁶ approach, the substantial connection approach, to the choice of law as well.

Thus, the solution to the second situation remains very much a mystery. There are several factors, however, which argue against the result above being applied in the defamation situation. The first is, of course, that there being no clear ratio in the above case, it would be restricted to its facts. The new composition of the Supreme Court also adds another variable. As well, the *Interprovincial*¹¹⁷ case deals with a negligence type tort, a very different situation from defamation. In negligence, all elements of the tort have equal weight. In defamation, it is the publication which is the cause of action — “the making known of the defamatory matter after it has been written (broadcast), to some person other than the person of whom it is written (broadcast).¹¹⁸ In such a case, the tort may be seen as totally arising in the province of publication, without the problems of *Interprovincial*. Otherwise, one would have to wait to see which approach from *Interprovincial* was adopted. If Pigeon is adopted, the legislation would not apply and common law would rule. If Laskin was followed, one would apply the law of the place of the tort. In this, one would apply the substantial connection to the choice of law and the court could consider many factors, including the policies behind the various laws.

Once one decides there is jurisdiction, and the law to be applied is chosen, there are several other problems facing a court where there is a multi-state publication. In a national broadcast, for instance, injury to a national figure may occur in all ten provinces. It would be possible that an action could take place in all ten jurisdictions. However, there appears to be no need for this. A provincial court appears to have the ability to award damages for publications occurring in other provinces, as well as the province where action is taken.¹¹⁹ In considering the damages awarded, the court can consider the extent of the publication.¹²⁰

116. [1975] 1 S.C.R. 393

117. (1975), 53 D.L.R. (3d) 321 (S.C.C.)

118. Gately, *supra*, note 4 at 103

119. *Hubert and International School of Music v. DeCamillis and Canadian Accordion Institute Ltd.* (1963), 44 W.W.R. 1 (B.C.S.C.)

120. *Neeld et al. v. Western Broadcasting Co. Ltd. et al.* (1976), 65 D.L.R. (3d) 574 (B.C.S.C.)

The final aspect to be considered under jurisdiction is the joint liability aspect. The position is perhaps best outlined as follows:

. . . that the publication of a libel, composed by one, printed by another and distributed by a third, is a joint tort, with joint and several liability, for which reason, where it is published in a newspaper, the injured person may sue in the same action the editor, proprietor, the printer and the publisher, or such of them as he thinks fit, and that each is liable on the judgement for the whole amount.¹²¹

In a situation which merits, however, it might appear possible to sue one joint tortfeasor in one province, and another in a second province. The courts do not look lightly upon such a gold-digging operation. Where there is a single commercial enterprise in which the joint tortfeasors are involved, the courts will not permit a second action in another province against one joint tortfeasor where recovery has already been given against the rest in another province.¹²² Hence, the action against the distributor, who operated in Ontario, was disallowed where recovery was obtained in Manitoba on the same matter. However, another action would be allowed in situations where the suit is brought against the individual sellers of the books or magazines — as this is a separate tort and publication.¹²³ (Unless they can claim they are innocent disseminators). From this it might appear that individual broadcasting stations could be sued in various provinces for a national broadcast. However, the fact of the affiliation with the national network, engaged in one commercial enterprise, may apply to find there was a joint tort under *Thomson v. Lambert*,¹²⁴ and deny separate recovery. In any event, relief may be provided under the Nova Scotia Act, as recovery in another action in respect of publication of matter to the same effect can be pleaded as mitigation of damages.¹²⁵

VII. Conclusion

Defamatory statements can and are published through the use of radio and television. The special nature of these media create special problems in relation to the law of defamation, and yet in

121. *Popovich v. Lobay et al. (No. 2)*, [1937] 2 W.W.R. 523 (Man. C.A.)

122. *Thomson v. Lambert*, [1938] S.C.R. 253

123. *Lambert and Lambert v. Roberts Drug Stores, Limited*, [1933] 3 W.W.R. 508 (Man. C.A.)

124. [1938] S.C.R. 253

125. Defamation Act, R.S.N.S. 1967, c. 72, s.5

many instances, the age old law is applied to the new medium without any critical analysis. There have been isolated judgements recently in Canada which have begun to realize the special problems that do exist, such as in the field of pleadings, news services and fair comment. However, "there is surprisingly little Canadian or English authority dealing with the problem in audio-visual presentations such as live theatre, motion pictures or television broadcasts."¹²⁶ It can only be hoped that there will be continuing recognition of the special characteristics as more and more cases come to the courts.

However, there are already areas in which change, if considered necessary, must come from the legislature, such as in areas of due care, injunctions, and perhaps in relation to Parliamentary privilege. Change is decidedly needed in the area of cable television. However, with such change will come the constitutional problems of the 'special' legislation. There is a strong argument that the province is competent here, although conflicting federal legislation may be paramount.

Other problems also exist which must be resolved by the courts. The susceptibility of radio waves to transcend boundaries creates many problems in jurisdiction and conflict of laws. The situation in Canada is far from clear and needs clarification.

In all these areas, however, the prime concern should be the recognition of the unique characteristics of radio and television. Once that is recognized, perhaps many of the problems will be overcome. As well, the way would be open for a developing law to cope with new forms of communication which are sure to develop with our fast advancing technology.

126. *Lougheed v. Canadian Broadcasting Corporation* (1978), 4 C.C.L.T. 287 (Alta. S.C.)