

# LEGALFOXES LAW TIMES

## THE ANALYSIS OF THE BROADCASTER'S LIABILITY IN DEFAMATION DURING LIVE TELECASTING

### INTRODUCTION

Defamation during live broadcasting is the shady area of law not receiving much of the scholarly attention. The liability for the republication of the defamatory material makes the broadcasters liable in the suit of defamation. But how is this correct to hold them liable when the anchor or the broadcaster does not know, in case of live broadcasting, what the other party is going to utter. This research paper will analyse the case-laws, statutes, and other authoritative sources of various jurisdictions.

Imagine if you are anchor conducting a live interview on the television network. You asked the person whom you are interviewing – who is responsible for the recently held terrorist attack on a particular place. That person cited the name of a random guy. That guy can bring on the defamation suit against you, your channel and of course that person who cited his name. The law of most countries is murky in such scenarios. This paper will entail the determinative factor in deciding the liability during live broadcasting.

The law of the defamation holds everyone liable whoever goes for the republication of the defamatory statement. Therefore, as soon as the statements go on air over the television, the broadcaster is booked for the defamation. Various case laws have cleared the murky situation of law by its judgments.

### UNITED STATES OF AMERICA

In the famous case of Adams v. Frontier Broadcasting Company<sup>1</sup>, Bob Adams, a businessman and active politician of Wyoming, sued the owner of KFBC radio- Frontier, when the live caller on the radio talk show- "Cheyenne Today" defamed him. The caller said that Mr. Adams "had been discharged as Insurance Commissioner for the dishonesty."<sup>2</sup> She earlier remarked that she had the prepared statement to speak about him. Mr. Adams being a politician was a public figure, therefore the Supreme Court of Wyoming asked him to prove the presence of "actual malice" (following the precedent of New York Times v. Sullivan<sup>3</sup>) on the part of the radio company owner, to make him liable. The politician argued that the failure on the part of the station to employ the electronic delay system intended the presence of actual malice on his part. But the court refused to take this argument and remarked that the radio station was not having any knowledge of the contents of that live caller and thus could not have held them to be false before the broadcasting of the call. Therefore, the radio company was not liable. The court also mentioned that the establishment of "reckless disregard" to prove the actual malice lies upon Adams and his duty was to point towards such factual records which could prove that Frontier entertained serious doubts regarding the truth of this publication. Since the station was not having any knowledge of the contents of the caller, Adams could not establish the presence of actual malice. The court had also mentioned about the decision of Sullivan case where the Supreme Court categorically mentioned about the fact that the knowledge of the statement being false is one of the conclusive factors in the determination of the liability, and also the failure to investigate the statement did not amount to the presence of actual malice in the conduct of the radio company, and neither then deprivation of the chance to check the information and form the conclusion concerning falsity as to truth.<sup>4</sup> The court further mentioned that the broadcasting industry was being heavily regulated by the federal government, so the requirement of delay technology might lure the broadcaster to take out the comments with which the broadcaster did not agree.<sup>5</sup>

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<sup>1</sup>555 P.2d 556 (Wyo. 1976).

<sup>2</sup>Mathew D. Bunker and Clay Calvert, "Defamation Live": The Confusing Legal Landscape of Reputation in Live Broadcasting and a Call for a "Breaking News Doctrine", Volume 39 No. 4, Columbia Journal of Law and Arts, 497, 503 (2016), 2-39.4-Calvert.

<sup>3</sup>376 U.S. 254 (1964).

<sup>4</sup>555 P.2d 556 (Wyo. 1976).

<sup>5</sup>555 P.2d 556 (Wyo. 1976).

In another case of Brecht v. Fisher Communications, Inc.,<sup>6</sup> Paul Brecht, an endorser of the local political contestant, prosecuted the Fisher Communications radio station for defamation after the anonymous callers (two in number) accused him of having been the offender of domestic violence during the morning talk show. The court regarded the plaintiff as the limited purpose public figure. It also held that the talk show hosts had failed to check the veracity of the anonymous callers' statements before the time it got aired. In the end, Brecht was not allowed to get any action against the company on his failure of the demonstration of the presence of actual malice.

In Demman v. Star Broadcasting Company,<sup>7</sup> the unknown caller called the radio station on the Election Day and verbally attacked a local political candidate. The case was different in the manner that it was equipped with the electronic delay system but the persons at the station failed to press that panic button. The Utah Supreme Court held that the failure to press the panic button was not enough to be regarded as the actual malice on the part of the station, and thus the judgment came into the favour of the radio station.

In another case of this nature – Snowden v. Pearl River Broadcasting Corporation<sup>8</sup>, callers during the live show of the radio accused the plaintiffs (including a local doctor) of selling the illegal drugs. The radio station, in this case, was not having any delay equipment. Although the radio defended itself on similar grounds, it also mentioned an important point. It claimed that the statements were concerning the private individuals being involved in matters of public interest. This distinction between public and private individuals was not well-received later after the decision of the Rosenbloom v. Metromedia, Inc.<sup>9</sup>.

The reasoning derived from the above-mentioned cases is that in the situation of the live broadcasting, the broadcaster does not have any time to assess the veracity of the statement as the statement is already been transmitted, therefore reckless disregard cannot be established in such cases. A reasonable amount of time is required to make the judgment regarding the veracity of the spoken statement. That could not have happened during live broadcasting owing to the paucity of time. Therefore, the defence of actual malice did not work in these cases.

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<sup>6</sup>2011 WL 1120506, 160 Wash. App. 1040 (2011).

<sup>7</sup>497 P.2d 1378 (Utah 1972).

<sup>8</sup> 251 So. 2d 405 (La. Ct. App. 1971).

<sup>9</sup> 403 U.S. 29 (1971).

There have been many statutes that provide statutory protection to the broadcasters during the live telecasting of any defamatory remarks by the third parties. The peremptory requirement of these statutes is the proof by the plaintiff that the defendant was negligent in his conduct. For instance, the statute of Virginia in this regard protects the owners and operators of the broadcasting stations and its agents from the liability if the plaintiff is not able to prove that the broadcasters "failed to exercise due care to prevent the publication or utterance of such statement, in such broadcast."<sup>10</sup> In the same way, the statute of South Dakota states that to prove the liability of the broadcasters, the plaintiff has to prove that the broadcaster "failed to exercise due care to prevent the publication or utterance of such statement in such broadcast."<sup>11</sup>

There are also some states in America which place the burden of proof of negligence on the side of the broadcaster. For example, the statute of state Ohio protects the broadcasters only when they prove that "the owner, licensee, or operator exercised reasonable care to prevent the publication or utterance of the statement in such broadcast time."<sup>12</sup>

Numerous statutes are protecting the broadcasters from the liability when the defamatory remarks are made by the persons contesting for the political office. The statute of Ohio also provides for the exemption in cases where it is mandated by the federal government or any act or ruling under it. These types of provisions do not carry the component of negligence with them as the broadcaster is not entrusted with any legal duty, in such scenarios, to censor the speech.

After the famous cases of *Sullivan*<sup>13</sup>, and *Gertz v. Welch, Inc.*<sup>14</sup>, the statutes of most states require that there must be the element of negligence in case of private individuals' charge of defamation against the broadcasters. It must be acknowledged that the reasonable protection in case of live and spontaneous defamatory remarks made by the third parties is available in the cases of public officials only. In the case of private individuals, the statutes mostly mention the element of negligence to prove. However, the proving of negligence is very subjective in the sense that the element to prove negligence may differ from jurisdiction to jurisdiction.

## INDIA

<sup>10</sup>VA. CODE ANN. § 8.01-49 (2015).

<sup>11</sup>S.D. CODIFIED LAWS § 20-11-6 (2015).

<sup>12</sup>OHIO REV. CODE § 2739.03(B) (2015).

<sup>13</sup>376 U.S. 254 (1964).

<sup>14</sup>418 U.S. 323 (1974).

In India, defamation is widely dealt with under criminal law. Indian Penal Code defines the defamation under section 499 IPC<sup>15</sup> as “Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person”. Section 500<sup>16</sup> states the quantum of punishment in the case of criminal defamation. A person liable for the defamation can be punished with simple imprisonment for a term of 2 years or fine or with both. Section 501<sup>17</sup> deals with the situation “when someone prints or engraves any material with the knowledge that it is defamatory, that person can be punished with the simple imprisonment up to two years or fine, or both”. While section 502<sup>18</sup> states that when someone “sells or offers to sell the defamatory material with the knowledge that it is defamatory, that person can be punished with the simple imprisonment up to two years or fine, or both”.

However, the code does not specifically deal with the matters concerning the live defamation. That's why it has been dealt with separately by the News Broadcasting Standard Authority (NBSA)<sup>19</sup> in one of its guidelines for the broadcasters titled- "Guidelines on Broadcast of Potentially Defamatory Content".

The guidelines strictly mention that the broadcasters must edit the sensitive matter to minimize the liability they can suffer in such matters. The news anchor or the presenter is prohibited from asking any derogatory or the judgemental statements during the programs. According to the norms, the news channels are prohibited from reporting the derogatory or derisive content. The guidelines also mention the situation of the "live" broadcast. It states that "if a potentially defamatory or libellous statement is made by a person, the news channel should take immediate steps to disclaim it". It further mentions that "Before reporting any accusation or allegation the version of the person affected must be obtained and aired simultaneously with the accusation or allegation to give a complete picture to the viewer. In the event of inability to obtain the version

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<sup>15</sup> Indian Penal Code, 1949, § 499, No. 45, Imperial Legislative Council, 1860 (India).

<sup>16</sup> Indian Penal Code, 1949, § 500, No. 45, Imperial Legislative Council, 1860 (India).

<sup>17</sup> Indian Penal Code, 1949, § 501, No. 45, Imperial Legislative Council, 1860 (India).

<sup>18</sup> Indian Penal Code, 1949, § 502, No. 45, Imperial Legislative Council, 1860 (India).

<sup>19</sup>News Broadcasting Standards Authority is an independent body of the News Broadcaster Association to consider and adjudicate the complaints related to the broadcasts.

of the affected person(s) within a reasonable period, the same should be aired simultaneously and authentic contemporaneous records of the effort made should be maintained.”

The channel must check the veracity and credibility of the news and programs, and the channel must not become the platform for spreading the animosity.

As per the norms of “Journalistic Conduct”, issued by the Press Council of India<sup>20</sup>, insertion of out-of-context and irrelevant statements likely to malign a person or an organization must be eschewed. Although the guidelines deal comprehensively with newspapers, it could be inferred that the journalists are required to screen out the defamatory remarks beforehand, if they could.

## **EUROPEAN COURT OF HUMAN RIGHTS**

The European Court of Human Rights (ECTHR) has said on multiple occasions "Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play the vital role of public watchdog." It also has mentioned that the right to freedom of the press does not only belong to

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<sup>20</sup>The Press Council of India is a statutory and adjudicating organization in India formed by the Parliament in 1966.

the individual journalists but also to those "who write, edit and publish, but also by those who read".<sup>21</sup>

Many of the journalists spend their time reporting the words of the other people, or in case of telecasting, interviewing or discussing the important issues with someone or others. The European Court of Human Rights has dealt with multiple cases where the national courts of the country have considered the journalists liable for the statement of the others. The stand of the European Court is a great sigh of relief as many countries still see it as the fault of the journalists.

In the case of Jersild v. Denmark<sup>22</sup>, this situation was dealt with by the court, though the case was not about the defamation. Jersild, a journalist of Denmark, made a television documentary having "a group of neo-Nazi youths". During the documentary, the people of this group made several offensive racist statements. On receiving many public complaints against the documentary, the authorities prosecuted the subjects of that documentary and Jersild, and convicted them under "the racial hatred laws".

The European Court made a remarkable observation during this case. It stated that the courts do not have any role in determining the working of the journalists. It mentioned that "*the methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not true for this court, nor for the national courts for that matter, to substitute their views for those of the press as to what technique of reporting should be adopted by journalists.*"<sup>23</sup>

The court further stated that "*taken as a whole, the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas. On the contrary, it sought – through an interview- to expose, analyse and explain this particular group of youths, limited and frustrated by their social situation, with criminal records and violent attitudes, thus dealing with specific aspects of a matter that already then was of great public concern.*" Thus, "*the punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to the discussion of*

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<sup>21</sup>CC, 29 July 1986, 110.

<sup>22</sup>Application No. 15890/89, Judgment of 23 September 1994, para 31.

<sup>23</sup>Jersild vs. Denmark, Application No. 15890/89, Judgment of 23 September 1994, para 31.

*matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.”*

Recently, Nikitas Lionarakis<sup>24</sup>, a Greek broadcaster, was held liable for the defamation and instructed to fine to the individual who was insulted by the guest interviewed during the live telecasting of that interview. The European Court stated that the rights of the broadcaster under Article 10 were violated owing to the lack of ability for the remarks of the individual during the live broadcast. The court reiterated “..requiring that journalists distance themselves systematically and formally from the content of a statement that might defame or harm a third party is not reconcilable with the press's role of providing information on current events, opinions, and ideas.”<sup>25</sup> It should be taken *prima facie* that the journalists are not associated with the opinions of others held during the live interview or any other interview, and should not be booked for the same, given that they have not endorsed the views of the interviewee.

## THE CASES OF RADIO BROADCASTING

The cases of defamation arising during the live telecast of any program in television are analogous to the broadcasting of any radio program. Multiple case laws are bringing out the factors determining the liability of the broadcasters during the radio programs.

In the case of Summit Hotel Co. V. National Broadcasting Company<sup>26</sup> the broadcasting company leased its facilities to any advertiser, which subsequently hired a performer to speak on "a series of programs" sponsored by the other company. As per the facts of the case, there was a prepared script which the performer was supposed to speak, but during the broadcast, he made an extemporaneous remark against the plaintiff. Consequently, the plaintiff bought the suit of defamation against the broadcasters. The broadcasters were not held liable for the statements of the performer as he did not speak the scripted lines. This case brings on the important point of checking the statements by the broadcasters before it goes on air. But the broadcasters are not held liable for the statements which are not scripted or spoken instantaneously by the speaker.

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<sup>24</sup>Lionarakis vs. Greece, Application No. 1131/05, Judgment of 5 July 2007.

<sup>25</sup>Ibid 24.

<sup>26</sup>8 A.2d 302, 336 Pa. 182.

In the same case like this, but the change in the material facts, where the speaker made the defamatory remarks from the scripted writings. The broadcaster was held liable by the court for the offense of defamation.<sup>27</sup> The court, in the earlier case, commendably prevented itself from making the decision harsh and unreasonable as holding someone liable for what is beyond the control for him. But such defence is only available when the broadcaster can show that he has employed the "due care" in the matter. Otherwise, he may be booked for slander.

## **ENGLAND**

In England, the cases of defamation are adjudicated based on the case laws and Defamation Act, 2013<sup>28</sup>. Though the act does not deal with the peculiar situation explicitly, the broadcaster is allowed to avoid the liability in case of defamation during the live program if the broadcaster can prove that

1. The statement was made in such circumstances that they couldn't have the control over the person making the defamatory remark.
2. They have taken the "reasonable care" with regards to the production, and did not know any reason to believe "that they were contributing to the publication of the defamatory remarks".

The abovementioned conditions are the complete defence to the defamation for the broadcasters in addition to the defence of truth. However, it is pertinent to take note of the fact that the presenters must take immediate as well as the effective action to "distance the program and the broadcaster from the offending remark, which must not be repeated.

There are various guidelines issued by the authorities regulating the broadcasting network regarding the broadcasting procedure. In this, it is mentioned specifically how to deal with the situations of live defamation. For instance, if a defamatory remark is published during the live broadcast, then the commissioning editor must, within the reasonable time possible and within 24 hours, brief the program makers and give the full report regarding it to the editorial head, the chief creative officer and the lawyer advising the program.

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<sup>27</sup>Sorenson v. woods (1932), 123 Neb. 348, 243 N. W. 82.

<sup>28</sup>2013 c 26.

The channel is provided with the options of distancing itself from the libellous remark by stating in this regard, and apologizing for it if deemed necessary. This thing is mostly done by the anchors or the presenter of the live- show issuing the apology during the ongoing telecast. They must not refer to that remark afterward. The remarks should be edited from the repeat telecast of the program.

## **CONCLUSION**

It has been seen that there are relatively few countries that have made comprehensive legislation on this aspect of the defamation. In India, this aspect is not embedded in the sections dealing with the topic of defamation in the Indian Penal Code. Although the guidelines have been issued by the television channels in this respect which have been mentioned before, a more comprehensive legal framework should be framed for this situation. The journalists must be able to perform their jobs without any fear of being sued for the comments spoken by someone else without their endorsement.

The United States of America has dealt with this situation better than the rest of the countries. The statutes passed by the states of the USA have proved to be the milestones in providing the directions to frame some guidelines on this murky area of law. Also, the rules determining the liability of the broadcasters in the defamation during the radio –broadcast can be analogous to that of defamation during live telecasting. Therefore, the laws of the USA concerning this area are nonetheless effective than the other countries currently.

One of the most remarkable things is the stand of the European Court of Human Rights in this respect. They have guided the national countries, which have prosecuted the journalists for the statements of the others, to adopt a more rational and fair approach towards the journalists. The European Court of Human Rights has even remarked that the journalists should not be booked for the statements of others, lest the freedom of the press should be compromised. This point of view regarding journalism or media at large from the perspective of international law proves to be the essential backup for this niche area of law.

Though the Defamation Act, 2013 of England does not directly deal with this situation, the guidelines make the situation nonetheless clear that primarily the onus of responsibility will be on the journalist to make sure nothing defamatory goes on in the air, if it does, he must make an apology for exempting the liability of the broadcasters. The situation is the same as India, where the guidelines issued by the respective channels clear the scope of this blurred area of law.

As mentioned earlier, the guidelines, though make clear, alone are not sufficient to deal with the current situation. A comprehensive legal framework is the need of an hour. The surrounding circumstances and the subject-matter of the news (these conditions are mostly ignored by the guidelines) should also be given due importance in framing the guidelines so that the presenter or the interviewer does not get booked for the defamation immediately on account of the statements of others.