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Constitutional Law - Freedom of Expression and the Constitutional Privilege to Defame - Adams v. Frontier Broadcasting Co.

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CONSTITUTIONAL LAW—Freedom of Expression and the Constitutional Privilege to Defame. Adams v. Frontier Broadcasting Co., 555 P.2d 556 (Wyo. 1976).

On July 21, 1972, the Mayor of Cheyenne participated in an "open mike"[1] radio talk program, "Cheyenne Today", and discussed a proposed project to improve land east of Cheyenne. The Mayor mentioned that Bob Adams, former state legislator and Insurance Commissioner, was associated with the project. Questions were invited from the listening audience. An unidentified caller phoned in and declared that Adams had been discharged as Insurance Commissioner for dishonesty.[2] Adams sought recovery for defamation, alleging careless and negligent conduct of Frontier Broadcasting in failing to control and monitor its facilities during the program by use of a tape delay broadcast system. The district court found Adams to be a public figure within the meaning of *New York Times Co. v. Sullivan.*[3] Finding no evidence of malice on the part of Frontier in broadcasting the defamatory remark, the court granted Frontier's motion for summary judgment. On appeal the Wyoming Supreme Court held that the commitment to uninhibited and wide-open public debate must, on balance, outweigh a public figure's right to be free from defamatory remarks. The Court also held that failure to use an electronic tape delay system in connection with an open mike talk show on which a public figure is defamed does not constitute reckless disregard for the truth.[4]

DEFAMATION AND THE CONSTITUTIONAL PRIVILEGE

Man's right to be free from defamatory remarks has long been a principle of law which "reflects no more than our

1. Live radio talk show in which members of the listening public are invited to join in the discussion.
2. Adams v. Frontier Broadcasting Co., 555 P.2d 556 (Wyo. 1976) [hereinafter cited as Adams].
3. 376 U.S. 254, 279 (1964). The Court actually applied he United States Supreme Court's expansion of the *Times* doctrine to include public figures, those people who voluntarily place themselves in public controversy, or those whose fame is so pervasive as to make them public figures. Curtis Publishing Co. v. Butts, 388 U.S. 130, 162 (1967); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
4. Adams, *supra* note 2.

basic concept of the essential dignity and worth of every human being."[5] Defamation is an invasion of reputation and good name by statements which tend to hold a person up to hatred, contempt, or ridicule, or cause him to be shunned or avoided.[6]

Injury to reputation can be as real and damaging as any physical injury. The law, therefore, gives redress for wrongful invasions of this sort in order to prevent recourse to self-help remedies.[7] The legitimate state interest underlying the law of defamation is the need to compensate individuals for harm inflicted by defamatory falsehood.[8]

This interest cannot be viewed in isolation. The United States Constitution guarantees to each individual freedom of expression.[9] There is a legitimate state interest in the free flow of information and public discussion. On the one hand, each person is free to express himself, but on the other, liable if the wrong thing is said. The Supreme Court has accommodated these potentially conflicting interests with respect to private individuals by declaring that defamatory words belong to that category of utterances which "are of no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[10] Prevention and punishment of defamation of private individuals has never been thought to raise any constitutional problems.[11]

In cases involving defamation of public figures or officials, when matters of public concern are in controversy, society's interest in free and open debate has seemed to outweigh the right to be free from defamatory falsehood. When public issues are involved, the right of the public to have access to social and political ideas is thought to be crucial[12]

5. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966).
6. PROSSER, LAW OF TORTS, § 111, at 739 (4th ed. 1971).
7. *Id.*
8. Gertz v. Robert Welch, Inc., *supra* note 3, at 323.
9. U.S. CONSTITUTION amend. I; WYO. CONST. art. 1, § 20.
10. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
11. *Id.*
12. New York Times Co. v. Sullivan, *supra* note 3, at 270.

to the making of informed decisions on such issues. Defamation of public figure has, therefore, been judged by a different standard than that applying to private individuals because public figures commonly inject themselves into public controversy voluntarily and have broader avenues of reply to false accusations.[13]

Founded on the common law privilege of fair comment,[14] *New York Times Co. v. Sullivan* defined constitutional privilege and enunciated standards by which defamation of public officials could be judged. Finding libelous statements published about the Police Commissioner of Montgomery, Alabama, to be constitutionally protected, the United States Supreme Court held:

> The Constitutional guarantees require, we think, a federal rule that prohibites a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[15]

Decisions subsequent to *New York Times* have refined the rule by including public figures,[16] as well as public officials, within the ambit of protection, and defining reckless disregard for truth as acting with a high degree of awareness of probable falsity.[17]

Adams v. Frontier Broadcasting Co.: APPLICATION OF THE *New York Times* RULE

The Wyoming Supreme Court found the principal issue in *Adams* to be whether the need for private censorship outweighed the need for freedom of expression with respect to public figures.[18] The Court found Adams to be a public fig-

13. Gertz v. Robert Welch, Inc., *supra* note 3, at 342.
14. PROSSER, *supra* note 6, § 118, at 819.
15. New York Times Co. v. Sullivan, *supra* note 3, at 279-80.
16. Curtis Publishing Co. v. Butts, *supra* note 3, at 162.
17. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).
18. Adams, *supra* note 2, at 557.

ure and summarily disposed of Adams' more tenuous contentions[19] in order to deal with the question of whether or not failure to use a tape delay system constituted reckless disregard for truth.

Adams contended that the failure to use a tape delay system was negligent and wrongful, and that it constituted an invitation for defamatory remarks, since there was no way to control program content. Such conduct, Adams asserted, evidenced a reckless disregard for truth. The Court declared that if reckless disregard was to be alleged, it was Adams' burden to isolate factual material in the record which would constitute proof that Frontier in fact entertained serious doubts with respect to truth of the publication.[20] The standard of malice with respect to both reckless disregard and actual malice requires an opportunity on the part of the publisher to evaluate the matter to be published and form some conclusion as to its falsity or, at least, doubts as to its truth.[21] By not using a tape delay system Frontier deprived itself of any opportunity to evaluate the information and form a conclusion. Depriving oneself of opportunity to investigate does not constitute reckless disregard. The Court reasoned that under the circumstances of this case it was impossible for Adams to factually establish the actual malice required to show a violation of the constitutional standard enunciated in *New York Times*.[22]

The Court held that summary judgment was the appropriate remedy because the time and expense of litigation itself would have too great a "chilling effect" on public broadcasters. Further, the required use of a tape delay system on radio talk programs would result in the "ultimate extinction" of this kind of public forum.[23] A temptation for self-censor-

19. *Id.* Given the broader constitutional standard involved, the Wyoming Court dismissed Adams' contention that honesty or dishonesty was at issue. Adams also contended that Frontier's failure to grant right of reply violated the "fairness doctrine" of Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367 (1969). The Court held that Adams did not bring that cause of action in the proper court, and that it did not provide evidence of malice.
20. Adams, *supra* note 2, at 562.
21. St. Amant v. Thompson, *supra* note 17, at 731.
22. Adams, *supra* note 2, at 564-67.
23. *Id.* at 567.

ship would be created that broadcasters would find difficult to resist. Ultimately, through use of a ten second tape delay broadcast system, all comment from the public could be slanted to conform to the broadcaster's opinion, resulting in destruction of the uninhibited marketplace of ideas.[24] The Court condemned the "cowardice"[25] of the individual who made the call, but, in order to safeguard the right to free speech and preserve this forum of public debate, held the price of Adams' remedy too great.

Adams v. Frontier Broadcasting Co.: A FAILURE TO ESTABLISH STANDARDS OF PROFESIONAL RESPONSIBILITY

The Wyoming Court viewed *Adams* as presenting a choice between "requiring private censorship" and "safeguarding the fundamental right of free speech."[26] The Court thus foreclosed an opportunity to creatively shape a remedy which could safeguard freedom of expression while establishing, at the same time, standards of responsibility for public broadcasters. The Court failed to fully consider society's interest in preventing wrongful and unnecessary defamation of public figures. The Constitution requires that some falsehood be protected in order to protect free expression. However, the need to avoid self-censorship is not the only societal value at issue.[27] If it were, the Supreme Court would long ago have embraced the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from defamation liability.[28] Intentional lies or careless errors do not advance society's interest in public debate.[29] A public forum promoting intentional lies or careless errors likewise fails to advance public debate. The holding of *Adams* encourages an irresponsible public forum by failing to recommend reasonable standards of public broadcast responsibility. Members of the listening audience can call in on open mike programs and say anything about any public figure without fear

24. *Id.* at 566-67.
25. *Id.* at 567.
26. *Id.*
27. Gertz v. Robert Welch, Inc., *supra* note 3, at 341.
28. *Id.*
29. *Id.*

of liability, and the broadcaster can freely act as a conduit for defamatory falsehood.

The Wyoming Court analogized radio programs of this sort to town meetings and reasoned that they are utilized in a similar way to afford every citizen an opportunity to speak his mind on any given issue.[30] Similarities between the two forums exist, but there is one very important difference. True public debate took place in those early town meetings. Citizens could not hide behind the shelter of a telephone receiver, but confronted each other face to face, with equal opportunity to accuse and defend. Debate is a reasoned argument between persons of different opinions,[31] necessarily involving give and take. An open mike talk show does not provide a forum for debate when the individual being accused or defamed is not even present on the program to reply. Even though public figures may have greater access to means of reply to defamatory falsehood,[32] there is substantial value in being able to answer at the time the accusation is made. Defamatory statements might do irreparable harm despite the potential for answer, especially if that answer is given days later to a different audience. The "chilling effect" on public officials and figures[33] might be substantial if public broadcasting "pot shots" continue in this fashion.

The Wyoming Court's fear that censorship will run rampant if the tape delay system is used seems unwarranted. One of the reasons radio stations are in business is to make money. The profitability of such shows should not be overlooked as open mike programs are of interest to the public and, consequently, to sponsors. Radio stations would not voluntarily ruin the profitability of this type of program by destroying spontaneity. In *Adams* the Wyoming Court painted a picture of broadcasters sitting next to tape machines, red-eyed, indiscriminately slashing comments and slanting

30. Adams, *supra* note 2, at 566.
31. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 582 (1971).
32. Gertz v. Robert Welch, Inc., *supra* note 3, at 331.
33. The chilling effect might be twofold: first, public officials and figures might be unwilling to participate on these programs to discuss topics of public concern; secondly, individuals with sensitive areas of personal privacy might be unwilling to run for office or become a part of public controversy.

opinion until programs are but skeletons of public thought. It is unlikely that this would result from using a ten second tape delay system. Radio stations have an important interest in these programs and unwarranted censorship would damage that interest. Furthermore, if stations have an interest in airing open mike programs, it would be reasonable to assume that they, too, are committed to free speech and would exercise any nominal censorship authority with extreme care, tipping the balance in favor of freedom of expression should difficult questions arise.

James Madison once said of the conflict between defamation and free speech:

> Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America.[34]

The conflict which troubled Madison and the fears held by the Wyoming Court are not present in the circumstances of *Adams*. The electronic tape delay system is a measure to correct without enslaving the press. Failure to use tape delay systems might not be reckless disregard for truth in the strictest sense. However, a much higher regard for truth and fairness would result should implementation of the device be required. There is potential for abuse or misuse, but if reasonable standards are explicit, broadcasters could be expected to use the tape delay system as a valuable tool to enhance true public debate. Whether the solution is legislative or judicial, the Wyoming Court missed an excellent opportunity to give needed direction in an area of law which has been almost entirely shaped by judicial decrees.[35]

CONCLUSION

The public broadcasting media has a position of extreme importance in the dissemination of news and comment

34. 6 WRITINGS OF JAMES MADISON 1790-1802 at 336 (G. Hunt ed. 1906).
35. PROSSER, *supra* note 6, § 118, at 819.

throughout society. A high level of professional responsibility should accompany the duty to disseminate news and comment.

In refusing to recognize the concomitant duty of the broadcasting industry, the Wyoming Supreme Court may have failed to preserve the integrity of that marketplace of ideas that it sought to protect through its decision.

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