Broadcast Negligence and the First Amendment: Even Mickey Mouse Has Rights

In *Walt Disney Productions, Inc. v. Shannon*,[1] the Georgia Supreme Court held that the trial court correctly granted summary judgment for defendant in an action brought by plaintiff for injuries sustained after plaintiff tried to imitate a demonstration he saw on television.[2] The court ruled that the suit was barred on first amendment grounds.[3]

Craig Shannon, the eleven year old plaintiff, saw a sound effects demonstration while watching the *Mickey Mouse Club Show* on television.[4] The performers on the show presented a demonstration of how to produce the sound of a tire coming off a car wheel.[5] An actor put a BB pellet in a "large, round balloon"[6] filled with air, and rotated the BB inside the balloon. Craig tried to duplicate the sound effect by putting a piece of lead larger than a BB in a "long skinny balloon."[7] He blew up the balloon and it burst, "impelling the lead into Craig's eye and partially blinding him."[8] Craig sued the producer, syndicator, and broadcaster of the *Mickey Mouse Club Show*,[9] contending that defendants were liable on the ground that they "invited him to do something posing a foreseeable risk of injury."[10]

The trial court granted defendant's motion for summary judgment on the grounds that "(1) the negligence claim [could] not be sustained as a matter of law and (2) the First Amendment [was] an absolute defense to this action."[11] The Georgia Court of Appeals reversed, saying that it was unable to hold as a matter of law that defendants could not be liable in

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1. 247 Ga. 402, 276 S.E.2d 580 (1981).
2. *Id.* at 404, 276 S.E.2d at 582.
3. *Id.* at 405, 276 S.E.2d at 583.
4. *Id.* at 402, 276 S.E.2d at 581.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 404, 276 S.E.2d at 582.
11. These grounds were stated in the opinion of the court of appeals. Shannon v. Walt Disney Productions, Inc., 156 Ga. App. 545, 545, 275 S.E.2d 121, 122 (1980).

tort for Craig's injuries.[12] The court of appeals ruled that the fir amendment did not constitute an absolute defense to liability in tl case.[13] The Georgia Supreme Court reversed the court of appeals. Finding that the statements which comprised the demonstration duri the television broadcast did not give rise to a clear and present danger personal injury to plaintiff,[15] the court ruled that the action was barre by the first amendment[16] and held that, therefore, the summary judgme motion was correctly granted by the trial court.[17]

The supreme court recognized the novelty of a suit of this type in Geo gia.[18] There have, however, been notable decisions of other states th have allowed damage suits against broadcasters for injuries sustained dissimilar factual situations. In *Weirum v. RKO General, Inc.*,[19] a Califo nia appeals court affirmed a verdict against a radio station, after plai tiff's husband was killed when his automobile was run off the road b persons chasing the defendant radio station's disc jockey in order to b the first to reach the disc jockey and win a station-sponsored contest. Th court identified the issue as "civil accountability for the foreseeable r sults of a broadcast which created an undue risk of harm to decedent," and found that "the First Amendment does not sanction the infliction physical injury merely because achieved by word rather than act."[21] St another California case concerned a damage suit against a broadcaster f injuries. In *Olivia N. v. NBC, Inc.*,[22] plaintiff sued the television produ ers after she was "artificially raped"[23] in a manner similar to that whic had been depicted during a television program. The court reversed judgment of dismissal,[24] on the ground that the question of whether tl television program fell within an area of unprotected speech was for jury since the judge had dismissed the case without any motion for sun mary judgment.[25] These courts recognized a tension between the fir

12. 156 Ga. App. at 545, 275 S.E.2d at 122. The court of appeals held that summa judgment was improper. *Id.*

13. *Id.* at 548, 275 S.E.2d at 124.

14. 247 Ga. at 406, 276 S.E.2d at 583.

15. *Id.* at 404, 276 S.E.2d at 582.

16. *Id.* at 405, 276 S.E.2d at 583.

17. *Id.* at 404, 276 S.E.2d at 582.

18. *Id.* at 402, 276 S.E.2d at 581.

19. 15 Cal. App. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975).

20. *Id.* at 48, 539 P.2d at 40, 123 Cal. Rptr. at 472.

21. *Id.*

22. 74 Cal. App. 3d 383, 141 Cal. Rptr. 511 (1977), *cert. denied sub nom.*, NBC, Inc. Niemi, 435 U.S. 1000 (1978).

23. *Id.* at 387, 141 Cal. Rptr. at 512.

24. *Id.* at 390, 141 Cal. Rptr. at 514.

25. *Id.* at 389, 141 Cal. Rptr. at 514.

amendment rights of broadcasters[26] and the viewers' or listeners' rights to recovery for infliction of injuries somehow linked to a broadcast. The courts in these decisions, however, chose to disregard the constitutional freedom in favor of providing a remedy for the injury. It was this long-recognized concern for the protection of speech that was the focus of the opinion in *Shannon*.

The United States Supreme Court began its delineation of protected speech in the early 1900s cases concerning subversive advocacy.[27] In *Schenck v. United States*,[28] Justice Holmes enunciated the clear and present danger test as a means for determining the limits of constitutional protection for speech: "The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[29] The determination of whether speech was constitutionally protected involved an interpretation of the parameters of this test. In *Whitney v. California*,[30] Justice Brandeis required a showing of imminent danger in order to satisfy the standard: "In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated."[31] In a later case, Justice Black's majority opinion in *Bridges v. California*[32] also required a showing of imminent harm:

> What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. . . . [The first amendment] must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.[33]

The clear and present danger test dealt basically with the action-inducing content of speech. If the unlawful action induced by the speech was suffi-

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26. There is authority to the effect that television broadcasters are entitled to first amendment protection. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969).

27. *See* Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919).

28. 249 U.S. 47 (1919).

29. *Id.* at 52.

30. 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

31. *Id.* at 376.

32. 314 U.S. 252 (1941).

33. *Id.* at 263.

ciently imminent, the utterance would not be protected by th constitution.

Another line of cases developed the principle that certain classes o speech were not constitutionally protected at all. In *Chaplinsky v. Ne Hampshire*,[34] the Court sustained a conviction under a state law after a speaker who was interrupted by police called one of the policemen a "damned fascist."[35] The Court reasoned:

> There are certain well-defined and narrowly limited classes of speech, the prevention of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are 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.[36]

It has been suggested that *Chaplinsky* created a two-tiered analysis o speech that was based on both the content of the speech and its impact "If speech fell within the ambit of *Chaplinsky*, it was unprotected regard less of its effect; otherwise *Bridges v. California* accorded it protectio unless it presented a clear and present danger of harm."[37]

In the area of tort law the Supreme Court has recognized a balancing o the right to free speech and the personal right to be kept from injury The cases concerning libelous speech claims illustrate the competin interests and justifications. The cases indicate that the basis of th *Chaplinsky* rationale, imminent harm, is still a major factor in question regarding first amendment protections. In *New York Times v. Sullivan*,[38] the Court found that libelous speech must be analyzed under first amend ment principles in spite of the *Chaplinsky* language and held that "a public official [could not recover] damages for a defamatory falsehood re lating to his official conduct unless he proves that the statement wa made with 'actual malice'—that is, with knowledge that it was false o with reckless disregard of whether it was false or not."[39] The rationale fo this approach was that a rule which requires a critic to guarantee th truth of all his factual assertions would lead to a form of self-censorshi

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34. 315 U.S. 568 (1942).

35. *Id.* at 569.

36. *Id.* at 571-72 (footnotes omitted).

37. Krattenmaker & Powe, *Televised Violence, First Amendment Principles and Socia Science Theory*, 64 VA. L. REV. 1123, 1179 (1978).

38. 376 U.S. 254 (1964).

39. *Id.* at 279-80.

in which more than false speech would be deterred.[40] The *New York Times* standard was later expanded to apply to libel actions brought by "public figures."[41] Requiring the higher standard of proof had the effect of protecting some speech that was untrue but which could not be proven as uttered maliciously. Even though the basis for libel is tortious conduct, the right to recovery for a dignitary injury was limited by the concern for protection of free speech rights.

A subsequent case, *Rosenbloom v. Metromedia, Inc.*,[42] both expanded and limited the *New York Times* rule. Actual malice was required to be shown when the alleged defamation occurred in the publication of a matter of public interest. At the same time, the decision required that actual malice only had to be shown by a public official if he was libeled within the scope of his official duties. *Rosenbloom*, however, is of questionable value as authority since the subsequent case of *Gertz v. Robert Welch, Inc.*[43] accorded libelous speech a more limited protection. In *Gertz*, the Court held that a newspaper or broadcaster publishing defamatory or false remarks about a person who is neither a public official nor a public figure could not claim that the publication was privileged under the first amendment on the ground that the subject was of public interest.[44]

The rationale for these decisions and the resulting limited protection for tortious speech embodies the safeguards of the clear and present danger test. In the case of public officials, the requirement of actual malice would sufficiently show that an imminent danger of harm or injury existed. The defendant who intentionally publishes untruths will know that his speech will directly inflict harm. This justifies a rule that such speech is not protected. On the other hand, in the case of private individuals, the requirement of a showing of actual damage[45] as a prerequisite to the imposition of liability for negligent defamation functions to show that harm from the tortious speech is certain and direct. Thus, two bases of the clear and present danger test are utilized to justify limited protection for classes of libelous speech: "1) The certainty of the purported harm, and 2) the imminent nature of the harm's occurrence."[46] The use of these bases for the clear and present danger test in only the libel cases does not mean that the concepts may not be functional in other factual situations as well.

One such situation was that addressed by the Georgia Supreme Court

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40. *Id.* at 279.
41. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
42. 403 U.S. 29 (1971).
43. 418 U.S. 323 (1974).
44. *See id.* at 343-45.
45. *See id.* at 349.
46. Krattenmaker & Powe, *supra* note 37, at 1184-85.

in *Shannon*: a bodily injury to a viewer alleged to have resulted fro television communication. As an initial matter, the court analyzed t question of whether the action was barred under the first amendment i light of the standards applied by the Supreme Court in the libel cases *New York Times* and its progeny.[47] Defendants evidently argued that t *Mickey Mouse Club* broadcast constituted speech concerning a general public interest and therefore, defendant's liability was conditional upc plaintiff showing that the statements were made, and that the show w presented, with a reckless disregard for the possible consequences. T court distinguished the libel cases on the basis that the *New York Tim* decision and its progeny contained a privacy component that was abse in *Shannon*. No individual privacy was invaded or threatened by t statements on the show; rather, the show was of a general content d rected at a general audience.[48] In addition, *Gertz v. Robert Welch, Inc.*, had effectively overruled the proposition that broadcasts regarding ma ters of public interest were absolutely privileged.[50] The libel cases we therefore inapposite in *Shannon*.

The major question for the court's consideration revolved around plai tiff's attempt to hold defendants liable for statements communicate through the medium of television.[51] Since plaintiff alleged that defe dants' show constituted an invitation which posed an unreasonable risk harm, some component of communication was involved. The court ther fore determined that this communication component made it necessary decide whether the speech comprising the television show was protecte Could the nonlibelous utterances contained in the television show neve theless expose the "speaker" to civil liability for injuries allegedly su tained as a result of the speech?

This analysis rests on the finding that, for first amendment purposes, does not matter whether speech is penalized under criminal or tort law. The fear of civil damage awards could inhibit freedom of speech as effe tively as fear of criminal prosecution.[53] The possibility of this sort of inh bition on speech in *Shannon* required a decision of whether the fir amendment protected the television broadcast in this case.

Under the traditional first amendment analysis, the speech which mac up the demonstration that Craig Shannon saw could not be categorize

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47. 247 Ga. at 402, 276 S.E.2d at 581. *See supra* notes 38-45 and accompanying text
48. 247 Ga. at 403, 276 S.E.2d at 581-82.
49. 418 U.S. 323 (1974).
50. *See supra* notes 43-45 and accompanying text.
51. 247 Ga. at 403, 276 S.E.2d at 582. The court assumed that the demonstration co prised speech, rather than speech plus conduct, which would invoke a different analysis.
52. *Id.* at 404 n.1.
53. *See* New York Times v. Sullivan, 376 U.S. at 277.

under the *Chaplinsky*[54] rule as speech which absolutely did not deserve any constitutional protection.[55] There was, however, another ground upon which a claim of privilege for the television show could be based. The court relied on the principles enunciated in *Schenck v. United States*,[56] and required that the words communicated on the television show present a clear and present danger of injury before liability could be imposed.[57] The infliction of personal injury was categorized by the court in *Shannon* as "substantial evil"[58] that the tort law could redress, in a fashion analogous to the justification for the clear and present danger test in the criminal context of *Schenck*. Since the communication on the television show was alleged to be the cause of the "substantive evil" in this case, first amendment jurisprudence dictated that the law could only prevent or penalize the speech through imposition of civil liability if the utterances involved presented a clear and present danger of injury.

By adopting this rule, the court implicitly relied on the imminent danger rationale that underlies the clear and present danger test.[59] The court did not elaborate on its findings, but a mere demonstration of the sound effect did not constitute a threat of imminent or immediate danger to the listeners. Conceivably, the individual's actions and reactions to the words comprised whatever danger might have existed. The mere utterance on the television show comprised no inherent threat.

The court in *Shannon* easily distinguished the California cases[60] that permitted actions against broadcasters for negligence. The supreme court interpreted those cases as permitting liability based on broadcast speech if defendant *incited* a third party to commit an unlawful act against plaintiff. The statements in *Shannon* did not amount to an incitement producing imminent lawless action[61] and there was no third party involved.[62] Again, a major, although unstated factor was imminence of harm from the speech itself. The demonstration in the television show was not directory or mandatory. It was basically entertainment and not

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54. 315 U.S. 568 (1942).

55. *See supra* notes 34-36 and accompanying text.

56. 249 U.S. 47 (1919).

57. 247 Ga. at 404, 276 S.E.2d at 582.

58. *Id.*

59. *See supra* notes 45-46 and accompanying text.

60. Olivia N. v. NBC, Inc., 74 Cal. App. 3d 383, 141 Cal. Rptr. 511 (1977), *cert. denied sub nom.*, NBC, Inc. v. Niemi, 435 U.S. 1000 (1978); Wierum v. RKO Gen., Inc., 15 Cal. App. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975).

61. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), stands for the proposition that an utterance is not protected if it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

62. 247 Ga. at 404 n.2, 276 S.E.2d at 582.

designed to promote immediate action.[63]

The *Shannon* decision brings another class of speech into the secon tier of the *Chaplinsky* analysis. The television show and the speech i contained were protected unless they posed a clear and present danger o immediate harm to the viewers. The court also alluded to the lack o certainty of harm from the speech when it found relevance in the fac that plaintiff was the only person who complained of injury out of a estimated sixteen million children who watched the show.[64] The function of the rule that denies protection to some forms of speech were not serve in this case because the harm was not imminent and it was not certain The court was therefore justified in protecting the speech in this case.

The status of plaintiff as a child relative to an alleged invitation t undertake a risky activity was considered in *Shannon*.[65] The court ana lyzed so-called "pied piper"[66] cases and distinguished them. The cour found that those cases basically contained two elements that justified th imposition of liability for exposing a child to an unreasonable risk: first there had to be an express or implied invitation to do something posing foreseeable risk of injury; and second, the defendant had to be chargeabl with maintaining or providing the child with the instrumentality whic caused the injury. The foreseeability issue was conceded, but the cour found that defendants did not provide Craig Shannon with an instrumen tality causing the injury.[67] These cases were not persuasive to the cour since there was little Georgia authority on point[68] and since application o contributory negligence or assumption of risk doctrines might have pre cluded recovery if the case went to a jury.[69]

Even though the instrumentality causing the injury had not been sup plied by defendants, the court justified its decision using only the firs requirement anyway. The clear and present danger test was used again b the court to satisfy this requirement. Since speech through the televisio

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63. Under the Brandeis concurrence in Whitney v. California, 274 U.S. at 372, it migh be argued that the speaker's intentions and expectations are relevant in regard to the exis tence of imminent harm. *See id.* at 376. In *Shannon*, it is doubtful that defendants expecte the demonstration to produce immediate harm to a viewer.

64. 247 Ga. at 405 n.4, 276 S.E.2d at 583.

65. *Id.* at 404, 276 S.E.2d at 582.

66. In the "pied piper" cases, adults have been held liable when their activities attracte children and exposed them to some risk. Most of the cases involve ice cream vendors an defendants in the cases have been held to a duty to protect the children they attract fro traffic hazards. *See, e.g.*, Mackey v. Spradlin, 397 S.W.2d 33 (Ky. 1965); Thomas v. Goodie Ice Cream Co., 13 Ohio App. 2d 67, 233 N.E.2d 876 (1968); Reid v. Swindler, 249 S.C. 483 154 S.E.2d 910 (1967). *See also* W. PROSSER, LAW OF TORTS § 33, at 173 (4th ed. 1971).

67. 247 Ga. at 405, 276 S.E.2d at 583.

68. *Id.* at n.3.

69. *Id.*

medium constituted the invitation, the court again stated that a predicate to liability for such an invitation was that the speech must present a clear and present danger of physical injury.[70] Since it was already established that there was no clear and present danger, there could be no liability, even though the risk might have been foreseeable. This is analogous to the actual malice standard in the libel cases. A greater standard of proof is required in order to serve a certainty of harm function when liability is sought to be imposed on the basis of television communication creating the invitation.

This is the heart of the legal rationale for the decision. The court was hesitant to allow the imposition of liability for fear of speculative and remote claims. The clear and present danger test adopted in the opinion basically serves the imminence and certainty functions of the traditional rules protecting first amendment rights. It is important to remember that the court in *Shannon* did not decide that a broadcaster could never be liable; it only decided that the requisite degrees of imminence and certainty of injury were lacking in this case. In a case in which the imminence and certainty functions are satisfied, liability would likely be imposed. In balancing the tension between the free speech rights and the rights to recover for injuries, the speech would not need protection if the functions are served because the speaker would, in effect, have constructive notice that harm would result if he does speak.

The court justified the decision and based its opinion on first amendment principles. A rule approaching absolute liability would likely have a chilling effect on speech. "[A] rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship."[71] Similarly, strict liability for all the consequences of televised communications would deter television producers and thereby deprive others of desired entertainment.

Conceivably, the first amendment was not the court's only consideration in the *Shannon* decision. In traditional tort analysis, there is a balancing of factors involved in any decision dealing with loss distribution.[72] Loss spreading is the policy of placing the loss on the one best able to bear it.[73] Loss avoidance is the policy of placing the loss on the one who has the best chance to avoid it. The *Shannon* case was somewhat different than garden variety negligence cases because the consideration of efficient loss distribution had to be weighed against a threatened imposition on first amendment rights.

It might be argued that the television producers and owners are the

70. 247 Ga. at 405, 276 S.E.2d at 583.
71. Gertz v. Robert Welch, Inc., 418 U.S. at 341.
72. W. PROSSER, LAW OF TORTS § 4, at 22 (4th ed. 1971).
73. *Id.*

best loss avoiders and loss spreaders, especially in a case such as this, ir which children are involved.[74] The public, however, should bear some o the burden for the benefits that the media provide. Of course, televisio stations could raise advertising rates and acquire insurance in order t absorb liability. These costs would inevitably be passed on to the public The logical approach is a reasonable limitation on claims for injuries fro broadcast negligence, such as that adopted in *Shannon*. Words and sym bols are subject to varied interpretation. To impose something similar t strict products liability[75] on television producers would almost encourag risky interpretation. Perhaps a limited liability rule such as that in *Shan non* would encourage responsible television viewing and interpretations.

The standard adopted by the court in *Shannon* will preserve the firs amendment freedom of speech and allow a balancing of rights relative t broadcast negligence. By imposing a reasonable limit on liability, thi standard will prevent remote claims more efficiently than a strict liabilit approach. In today's media-conscious world, the approach utilized in th *Shannon* decision might even encourage more responsible attitudes to ward the media by the public.

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74. *See* Comment, *Tort Liability of the Media for Audience Acts of Violence: A Con stitutional Analysis*, 52 S. CALIF. L. REV. 529, 541-45 (1979).

75. For a view of this approach, *see generally* Pearlman & Marks, *Broadcast Negligence Television's Responsibility for Programming*, 16 TRIAL 40 (Aug., 1980).