

Free Speech and Civil Liability for Defamation Under U.S. Law

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Course Goals

- 1) Knowledge of substantive rules and acquaintance with the legal topography
- 2) Facility with the interplay of law and fact
- 3) Understanding of how tort law changes
- 4) Appreciation of the relationship between common law and statutes

Focus: Rules, Process, Policy

Four Categories of Tort Liability

- *Liability based on Fault:*
 - ❖ Intentional Torts
 - ❖ Recklessness
 - ❖ Negligence

- *Liability without Fault:*
 - ❖ Strict Liability

Liability Based on Fault

- *Intentional Injury:*

- ❖ Purpose – subjective desire to cause a forbidden result
- ❖ Knowledge – “substantial certainty” that a forbidden result will occur

- *Recklessness:*

- ❖ Subjectively defined: conscious disregard of a serious risk
- ❖ Objectively defined: risk totally disproportionate to utility

- *Negligence:*

- ❖ Conduct posing an unreasonable risk of harm

Consequences of Classification:

The classification of a tort as intentional, reckless, negligent, or strict liability has a bearing on:

- a) Scope of Liability
- b) Punitive Damages
- c) Defenses
- d) Respondeat Superior
- e) Insurance
- f) Immunities
- g) Worker's Compensation
- h) Statutes of Limitation
- i) Bankruptcy

Defamation: Elements

1. A false and defamatory communication about P
2. Culpable publication to the third person who understands
3. Fault as to falsity (depending on status of P)
4. Proof of damages (unless statement warrants presumed damages)

Truth v. Falsity

- **There must be a provably false assertion of fact**
 - Unbelievable statements are not actionable
- **A statement that is substantially true is not actionable**
- **Pure opinions which do not imply facts are not actionable**

Opinions and Implicit Assertions of Fact

Consider:

- **Type of language used**
 - Extreme language rarely is “factual”:
- **Meaning of statement in context**
 - Did the word only denote anger?
- **Verifiability**
- **Circumstances**
 - Front page versus blogger’s rant
- **Whether the factual basis for the opinion was already disclosed**

When is a Statement Defamatory?

- Must reflect on P's personal **character**
- Must carry sting of **disgrace**
- Need only defame P in the eyes of some not anti-social **segment** of the community
- Some statements are defamatory "as a matter of law," some as a "matter of fact"

Pleading Defamation

If it is not otherwise clear, plaintiff must plead and prove:

- Colloquium (reference to P)
- Inducement (surrounding facts)
- Innuendo (defamatory meaning)

Two Kinds of Defamation

- **Libel: Written defamation**
- **Slander: Oral defamation**

This is sometimes important in determining whether P must prove damages

About the Plaintiff: Group Defamation

In determining whether the statement defames this plaintiff, consider:

- Size of group
- Inclusiveness of language
- Extravagance of charge
- Special circumstances

Culpable Publication

- **“Publication” is a term of art meaning communication to someone other than P who understands**
- **“Culpability” means that the matter must be communicated intentionally, recklessly, or negligently by D**
- **D is ordinarily not liable for P’s repetition of D’s statements**
- **Repetition by D is publication**
- **Publication starts the running of the statute of limitations**

Publication: Single-Publication Rule

- **Each edition or other aggregate communication (e.g. DVD, webposting) gives rise to just one cause of action subject to one statute of limitations**
- **A new edition is a new publication, but only significant changes to a website is a new publication**

The First Amendment

- **Prohibits Congress (and the States) from abridging freedom of the speech or of the press**
- **This imposes limits on defamation actions**

Reconciling the First Amendment with Defamation Principles

- Requirements (3) and (4) have changed
 - No strictly liability for false statements (3)
 - Truth is no longer a defense; P must prove falsity
 - Ps must now h prove damages in a wider range of cases (4)
 - Punitive damages are also limited

The 1964 Landmark Case: *New York Times v. Sullivan*

- There is a profound national commitment to the principle that debate on public issues should be **uninhibited, robust and wide-open**
- Errors must be protected to allow “breathing space” for free expression
- Permitting merely a defense of truth will deter more than false speech
- A **public official**, suing with respect to statements about official conduct, must prove “**actual malice**”: that D acted with knowledge of falsity or reckless disregard for the truth

Actual Malice Defined

- **Is a state of mind about truth or falsity**
- **Means knowledge of falsity or reckless disregard for the truth**
- **Requires a high degree of awareness of probable falsity**
 - **This is a subjective test for recklessness**
 - **D must in fact have entertained serious doubts about the truth of the publication**
- **Must be distinguished from both common-law malice (spite, ill-will, vindictiveness) and mere carelessness (negligence)**

Actual Malice is Very Hard to Prove

Is not established by mere:

- Lack of personal knowledge
- Lack of information of about veracity of source
- Failure to verify information or retract
- Ignorance that liability can be based on a quote
- Failure to discuss allegation with P
- Failure to present an objective picture
- Failure to search files
- Sloppy or speculative reporting that is an extreme departure from professional standards
- Evidence of a motive for publishing the falsehood
- Proof of hatred, enmity, or desire to injure

Evidence of Actual Malice

- **May be established by**
 - **Deliberate falsification**
 - **Fabrication**
 - **Reliance on a wholly anonymous call**
 - **Allegations that are inherently improbable or open to doubt for obvious reasons**
- **Must be established by clear and convincing evidence**
- **Is subject to *de novo* review**

How Far Does the Actual Malice Requirement Extend?

- NYT v. Sullivan (1964)
 - Public officials must prove actual malice
- Curtis v. Butts
 - Public figures must prove actual malice
- Rosenbloom v. Metromedia (1973)
 - Actual malice must be proved in all cases involving matters of public concern
- Gertz v. Robert Welch (1975)
 - Repudiates *Rosenbloom*
 - Private figures suing with respect to matters of private concern must prove at least negligence
 - Absent actual malice, damages are limited to “actual injury” and presumed and punitive damages may not be recovered
- Dun & Bradstreet v. Greenmoss Builders (1985)
 - Presumed damages may be recovered in cases involving matters of private concern

Today: 3 Categories

(1) Public officials and public figures suing with regard to their conduct, fitness, or role in that capacity

- Must show actual malice
- May recover presumed/punitive damages

(2) Private persons suing with regard to matters of public concern

- Must prove at least negligence as to falsity (states may set standard higher)
- Recovery is limited to “actual injury” (including emotional distress) unless actual malice is shown, in which case presumed and punitive damages are available

(3) Any person suing with respect to a matter of private concern

- Unclear whether fault as to falsity is required
- Presumed/punitive damages may be awarded without proof of actual malice

Defamation: Public Officials Defined

- Not all public employees are public officials
- The issue is whether the position in government has such apparent importance that the public has an independent interest in the qualifications of the person who holds the position, beyond the general public interest in the qualifications and performance of all government employees.

Defamation: Public Figures Defined

This category includes those who have:

- **Achieved notoriety because of their achievements**
- **Successfully sought public attention**
- **Thrust themselves to the forefront of public controversies to influence their outcome**
- **Involuntary public figures**

Defamation: Private Persons

One is not a public figure merely because one:

- **Is a lawyer**
- **Is active in the community**
- **Participates in litigation in which the public is interested**
- **Holds a press conference**

Traditional: Presumed Damages

Traditionally, presumed damages without proof of actual loss could be recovered for:

- All libel (libel per se)
 - In some states, only libel defamatory on its face of P or libel within the court slander per se categories
- Four types of slander (slander per se)
 - Major crime
 - Incompetence in business, trade, or profession
 - Loathsome disease
 - Serious sexual misconduct
- NYT (1964) & later cases impose limits on presumed damages

Defamation: Relationship to Other Torts

- The constitutional protections that have evolved in defamation actions cannot be circumvented by changing the name of the tort
- *Hustler v. Falwell*:
A publication about a public official/figure cannot support an outrage action unless it contains a false assertion of fact uttered with actual malice

Communications Decency Act

- No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

Subpoenas to Force Disclosure of Identity

- Under various tests, a motion to quash will be granted unless
 - D is acting in good faith
 - Balance of equities weighs in favor of D
 - D can survive motion to dismiss or motion for summary judgment
 - D makes a prima facie showing of defamation

Defamation: Libel-proof Plaintiff Doctrine

- **Where reputation is so bad that only nominal damages could be awarded, the court need not entertain the action**
- **Consider:**
 - **Anti-social nature of P's prior conduct**
 - **Number of prior offenses**
 - **Degree and range of publicity give to prior conduct**
 - **Whether guilt was previously adjudicated**

Defamation: Absolute Privileges

- Provide immunity without regard to the publisher's motives or the reasonableness of the publisher's conduct
- Six main categories:
 - Judicial proceedings
 - Legislative proceedings
 - Executive communications
 - Spousal communications
 - Communications required by law
 - Consent

Defamation: Qualified Privileges

- Will arise whenever there is good reason to permit the communication or conduct in question. Consider
 - The relationship between publisher and recipient
 - Whether the information was requested or volunteered
 - Whether the conduct sought to respond to a serious risk of harm that could be prevented
 - Whether P wrongfully provoked D's communication or conduct
- Are lost by:
 - Excessive publication
 - Improper motives
 - Actual malice (in some states, negligence)

Defamation: Reporter's Privilege

The publication of defamatory matter is privileged if it is:

- Contained in the report of an official action or proceeding or a meeting open to the public on a matter of public concern, AND
- Fair and accurate

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