

UNDERSTANDING DEFAMATION

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Law of Mass Communication

Anchorage
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Defamation protects:

- Reputational interests...

Damage to Reputation

“My initial response was to sue her for defamation of character, but then I realized that I had no character.”

- *Charles Barkley, commenting on Tanya Harding’s comment that, when she kneecapped Nancy Kerrigan, she was trying to be the Charles Barkley of figure skating.*

Defamation-Proof

Where a person's reputation has been irreparably injured by prior publications, he or she only can recover nominal damages for any subsequent defamatory statements.

Logan v. District of Columbia

Plaintiff sued a newspaper for libel because of an article which falsely reported that he had tested positively for drug use. Although the court found that the article was false and defamatory, it nevertheless held that the plaintiff was libel-proof on the specific issue of drug use because he was an admitted drug user, his use of drugs had been publicized in a book, he had been convicted of a federal narcotics violation and charged with another federal narcotics violation, and he had been committed for treatment under a federal drug treatment program.

Convicted Bank Robber

- Libelous to falsely report that he/she is a shoplifter?

Convicted Rapist

- Libelous to falsely report that he/she is a peeping tom?

Could Charles Manson Be
Defamed On Any Subject?

How About Idi Amin or Adolph
Hitler?

Defined in California Civil Code § 44:

Defamation is effected by either of the following:

- Libel
- Slander

Libel

Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. (See Civil Code § 45.)

Elements

- Statement of fact
- Defamatory
- Of and concerning the plaintiff
- Substantially false
- Fault
- Privileges

Element #1: Statement of Fact

- Objective facts provable as true or false

Factors That Signal Opinion:

- Language
 - Examples:
 - Rhetorical hyperbole, epithets, imaginative expression, cartoons, satire
 - Language of belief or political opinion

Jerry Falwell talks about his first time.*



FALWELL: My first time was in an outhouse outside Lynchburg, Virginia.

INTERVIEWER: Wasn't it a little cramped?

FALWELL: Not after I kicked the goat out.

INTERVIEWER: I see. You must tell me all about it.

FALWELL: I never really expected to make it with Mom, but then after she showed all the other guys in town such a good time, I figured, "What the hell!"

Campan, like all liquor, was made to mix you up. It's a light, 48-proof, refreshing spirit, just mild enough to make you drink too much before you know you're schnockered. For your first time, mix it with orange juice. Or maybe some white wine. Then you won't remember anything the next morning. Campari. The mixable that smarts.

INTERVIEWER: But your mom? Isn't that a bit odd?

FALWELL: I don't think so. Looks don't mean that much to me in a woman.

INTERVIEWER: Go on.

FALWELL: Well, we were drunk off our God-fearing asses on Campari, ginger ale and soda—that's called a Fire and Brimstone—at the time. And Mom looked better than a Baptist whore with a

\$100 donation.

INTERVIEWER: Campari in the crapper with Mom... how interesting. Well, how was it?

FALWELL: The Campari was great, but Mom passed out before I could come.

INTERVIEWER: Did you ever try it again?

FALWELL: Sure...

lots of times. But not in the outhouse. Between Mom and the shit, the flies were too much to bear.

INTERVIEWER: We meant the Campari.

FALWELL: Oh, yeah. I always get sloshed before I go out to the pulpit. You don't think I could lay down all that bullshit sober, do you?

© 1983—Imported by Campari U.S.A., New York, NY. 48 Proof (96°). Apertif (Liquor).



CAMPARI You'll never forget your first time.

*AD PARODY—NOT TO BE TAKEN SERIOUSLY

Falwell v. Flynt

- The inside front cover of the November 1983 issue of Hustler Magazine featured a “parody” of an advertisement for Campari Liqueur that contained the name and picture of Jerry Falwell, entitled “Jerry Falwell talks about his first time.”
- Although by the end of the “interview” it is clear that the ad refers to the first time Falwell sampled Campari, the ad clearly played on the sexual double entendre of the general subject of first times.

Be An Editor



Objective Facts That Are Provably True Or False?

The jury said:

- “No reasonable man would believe that the parody was describing actual facts about Falwell.”
 - Ad appeared in a satirical pornographic magazine;
 - Ad was inherently unbelievable insofar as Falwell was a religious minister;
 - At the bottom of the page is a disclaimer which states: “Ad parody – not to be taken seriously,” and the parody is listed in the table of contents as “Fiction; Ad and Personality Parody.”

Knievel v. ESPN

- Evel and his wife were photographed as they attended ESPN's Action Sports and Music Awards in 2001.
- Photograph depicted Evel, who was wearing a motorcycle jacket and rose-tinted sunglasses, with his right arm around his wife and his left arm around another young woman.
- Photograph published on extreme sports website with a caption that read: "***Evel Knievel proves that you're never too old to be a pimp.***"

Capable of being proved true or false?

- Totality of the circumstances:
 - Broad Context
 - Tenor of the entire work, the subject of the statements, the setting, and the format of the work
 - Specific Context
 - Content of the statements, the extent of figurative or hyperbolic language used, and the reasonable expectations of the audience in that particular situation
- Statement Sufficiently Factual to be Susceptible of Being Proved True or False?

“Pimp”

- Webster’s New World Dictionary – traditionally meant a man who is an agent for prostitutes and lives off their earnings.
- <http://www.ocf.berkeley.edu> – very ambiguous term, used as either a compliment or an insult towards a male. In its positive form, it means that the person is “cool”; in its negative form, it insults their attitudes, clothing, or general behavior.
- <http://www.slangsite.com> – used to compliment a person on their mastery of subject matter.

Holding

- Although the word “pimp” may be reasonably capable of a defamatory meaning when read in isolation, the term loses its defamatory meaning when considered in the context presented here. The term “pimp,” as used on the website, was not intended as a criminal accusation, nor was it reasonably susceptible to such a literal interpretation. Ironically, it was most likely intended as a compliment.

Element #2: Defamatory?

- Injurious to a person's character, fame, or reputation.

How do you determine if a statement is defamatory?

“A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”

- Justice Holmes, *Towne v. Eisner*

Stating That Person Is African-American?

Stultz v. Cousins

- A letter stating that the fireman was one-quarter Negro was sent on behalf of the union members to the master mechanic of the railway that employed them. As a consequence, which the union members knew would result, the fireman lost his preferred run and was transferred to a nonpreferred run.

Holding

- The letter was a clear allegation that plaintiff was of one-quarter negro blood. The publication of a writing containing such a statement in respect to a white man is libelous per se, at least in a community in which marked social differences between the races are established by law or custom.

Bowen v. Independent Publ'g Co.

- The publisher of a daily newspaper of wide circulation printed a statement, under the heading “Negro News” and under the picture of a colored soldier, that Ms. Bowen’s son had been transferred to a government hospital.

Issue:

- “Only one question is involved in this case. Is it libelous per se to publish in print of a white person that she is a Negro?”

Holding

Citing cases stretching back to 1791, the court concluded that neither the abolition of slavery, nor changes in the legal and political status of the “colored race” warranted departure from South Carolina precedent.

“Although to publish in a newspaper of a white woman that she is a Negro imputes no mental, moral or physical fault for which she may justly be held accountable to public opinion, yet in view of the social habits and customs deep-rooted in this State, such publication is calculated to affect her standing in society and to injure her in the estimation of her friends and acquaintances.”

What Unintended Consequence Do These Opinions Have?

Validating Racist Views

What the court was doing, in effect, was “assuming without question that the plaintiff’s community was a considerable and respectable one whose values are worthy of the law’s attention, respect, and support, and in doing so, validat[ing] racist views.”

- Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 Wash. L. Rev. 1, 30 (January 1996).

Stating That A Person Is Gay?

Albright v. Morton

- Book allegedly portrayed plaintiff as a “homosexual” by mis-captioning a photograph of a gay individual with plaintiff’s name.

Holding

“In 2004, a statement implying that an individual is a homosexual is hardly capable of a defamatory meaning.”

“If this Court were to agree that calling someone a homosexual is defamatory per se – it would, in effect, validate that sentiment and legitimize relegating homosexuals to second-class status.”

Other Courts Hold Otherwise

[Plumey v. Landmark Chevrolet, Inc, 122 F.3d 308, 311 \(5th Cir. 1997\)](#) (finding remark that plaintiff was a "faggot" was slander per se under Texas law because imputed crime of sodomy); [Nazeri v. Missouri Valley College, 860 S.W.2d 303, 312 \(Mo. 1993\)](#) (finding false allegation of homosexuality defamatory because homosexuality still viewed with disfavor, deviant sexual intercourse is misdemeanor in Missouri, and allegation imputes unchastity); [Head v. Newton, 596 S.W.2d 209 \(Tex. Civ. App. 1980\)](#) (finding plaintiff made prima facie showing of slander sufficient to maintain venue where defendant stated she believed plaintiff was homosexual or "queer" because statement imputed crime of sodomy); [Schomer v. Smidt, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662, \(Cal. Dist. Ct. App. 1980\)](#) (finding false imputation of homosexual act slander per se because equaled accusation of unchastity where defendant's alleged sexual activity was between unmarried individuals); [Moricoli v. Schwartz, 46 Ill. App. 3d 481, 361 N.E.2d 74, 76, 5 Ill. Dec. 74 \(Ill. App. Ct. 1977\)](#) ("fag" was not slander per se but was basis for defamation action).

Stating That A Person Is Illegitimate?

Be An Editor



How do you work through the issue?

What Will You Instruct Your Attorney To Research?

Whether society's mores and values have evolved to the point that stating or implying that a person is illegitimate does not damage that person's reputation.

Cessna v. Montgomery

“We as a people are more tolerant and sympathetic of the child born out of wedlock – we call him illegitimate, not ‘bastard’; we reserve the word ‘bastard’ for other uses (mostly defamatory or descriptive of content – and totally unrelated to minor children). The stigma attached to bastardy – for better or worse – has diminished substantially... A social policy which would treat illegitimate children as ‘unclean’ or ‘untouchable’ is unthinkable today.”

Pena v. Mattox

“The moral consensus that insisted on confining procreation within marriage has shattered. More than one in five American children are now born out of wedlock.”

Study by Department of Health and Human Services

“Dramatic changes have occurred in Americans’ views of marriage and childbearing”; “it has become more acceptable in recent decades to have sexual relationships before marriage, to cohabit without marriage, [and] to bear children outside of marriage[.]”

Statistics

- 1940 – the number of nonmarital births in this country was 89,500 – only 4% of the births that year.
- 2007 – the number of nonmarital births in this county was 1,714,653 – or almost 40% of the births that year.

Element #3: Of and Concerning the Plaintiff.

- If a newspaper reports that my wife had an affair, or that my son is a notorious drug dealer, or that my father is a terrorist, does that report defame me?

General Rule

There can be no vicarious defamation; to be actionable, the defamatory statement must be understood as being “of and concerning” the plaintiff.

Johnston v. KTBS, Inc.

On March 9, 2002, David Johnson and his wife, Ruby Johnson, were shot and killed in their home in Bienville Parish. The alleged murderer was their son, Robert Lee Johnson, who suffered from mental illness. On March 10, 2002, KTBS crime reporter Chris Redford and a photographer spoke with Bienville Parish Sheriff John Ballance about the double homicide. According to the reporter, Sheriff Ballance stated that the victims, David and Ruby Johnson, were brother and sister. This information was also given to KSLA reporter William Hayes by Deputy Randy Price, chief investigator of the Bienville Parish Sheriff's office.

On March 9, 2002, during the ten o'clock p.m. newscast, KSLA reported that David and Ruby Johnson, **"A twin brother and sister, who investigators say later married and had children, are now dead allegedly at the hands of one of their sons."** This story was repeated in the KSLA newscasts broadcast on March 10, 2002.

Holding

- Statements were not “of and concerning” plaintiffs; they were about plaintiffs’ deceased parents.

Lanni v. Courtroom Television Network

Plaintiff Lynn Ianni, by her own description, is a marriage and family therapist who became well-known when she began appearing as a “psychological counselor” for the controversial Fox Television reality show, “The Swan.” Referred to on the program as “Dr.” Ianni, plaintiff dispenses psychological advice and counseling to young women who agree to undergo drastic plastic surgery for the entertainment of a national television audience. Although television viewers may assume that “Dr.” Ianni is a medical doctor, she admittedly is not; instead, plaintiff justifies her title by explaining that she has a “Ph.D. degree in clinical psychology from California Coast University.”

The Smoking Gun Article

The Smoking Gun website published an article titled “Fox Doctor’s Diploma Mill Degree,” in which it is revealed that Ianni’s Ph.D., which she uses to rationalize being referred to as “Dr.” Ianni, is from an unaccredited correspondence school that did not require any classroom attendance and no longer even offers a Ph.D. program in psychology.

There's More...

California Coast University, which charged a flat fee for degrees like the one conferred on plaintiff, was one of a handful of institutions prominently mentioned in a May 11, 2004 report given to the U.S. Senate by the managing director of the United States General Accounting Office, entitled “Diploma Mills,” which criticized the use of taxpayer money to pay for degrees “from diploma mills and other unaccredited postsecondary schools” like CCU.

Ianni sued for defamation.

1. “CCU’s degree programs have not been designed to meet any particular local, state, or national licensing or credentialing laws, according to a 2003-2004 catalog.”
2. “The federal government is saying, hey, this is a diploma mill, this is not sort of a legitimate place where you should be giving people credit for being a doctor.”

Some other cases:

Chaiken v. VV Publ'g Corp., 1992 WL 168282 (S.D.N.Y. June 30, 1992) (denying leave to amend complaint to add children of man who was accused in newspapers of being involved in anti-Arab terrorist activity in Israel; “a cause of action for libel is not derivative and the defamatory statements must concern the named plaintiff”); ***Mitchell v. Random House, Inc.***, 703 F. Supp. 1250, 1256 (S.D. Miss. 1988) (“defamation of one family member does not normally give rise to a cause of action by another family member”; sister could not state defamation claim based on statement about her brother in a book); ***Ogren v. Employers Reinsurance Corp.***, 350 N.W.2d 725, 727-728 (Wis. Ct. App. 1984) (criticism of a “family” for not being loving enough to prevent a man’s suicide did not defame his uncles and aunts, ***although it did defame his mother and sister***); ***Beresky v. Teschner***, 381 N.E.2d 979, 982 (Ill. App. Ct. 1978) (no defamatory of parents to report that their deceased son was a major seller and user of heroin); ***Torres Silva v. El Mundo, Inc.***, 6 P.R. Offic. Trans. 581 (P.R. 1977) (“[o]ne of the most cherished values of our society is that persons are to be judged by their own acts not by family associations or by any other relationship”; holding well-known local band leader, who had sued because of a false report that he was the father of a man arrested on drug charges, could not state libel claim); ***Pogan v. Chambers***, 134 N.Y.S. 2d 691, 694 (N.Y. Sup. Ct. 1954) (statement in a book that plaintiff’s brother was a notorious Communist did not defame plaintiff).

Cuckold Cases:

Is a report that a wife had an affair “of and concerning” the husband?

Brewer v. Memphis Publ'g Co.

- Husband and wife brought a libel claim against the publishing company based on a newspaper article reporting that the wife, a former acquaintance of Elvis Presley, had a romantic encounter with him while he was married, and that she was divorced from her husband.
- Plaintiffs claimed that the article defamed them both by inaccurately stating that they were divorced, **defamed the husband by suggesting that he had been “cuckolded,”** and defamed the wife by conveying that she was involved in a relationship with a married man.

Holding

While noting the general rule that defamatory statements must be about the plaintiff to be actionable, the court recognized that “[i]t is also true, however, that certain defamations of one person also defame another who may not be named.”

What Did We Learn Tonight?

- Statement of fact
- Defamatory
- Of and concerning the plaintiff

Pop Quiz

Be An Editor



Fact Pattern

Your beauty and style reporter covered a fashion show last night and has submitted a draft article that includes the following statement:

- “J. Lo attended the event with her new boyfriend, Casper Smart. OMG, what a hottie! Wish I had the nerve to be a cougar!”

Who is likely to sue?

What statement(s) would form the basis of her claim?

Is the statement “of and concerning” her?

Is the statement fact or opinion?

Is the term “cougar” defamatory?

Cougars?

- Demi Moore
- Courtney Cox
- Susan Sarandon
- Goldie Hawn
- Mariah Carey

That's All Folks!