

USLegal Guide to Defamation; Libel and Slander



INTRODUCTION

The law of defamation protects a person's reputation and good name against communications that are false and derogatory. Defamation consists of two torts: libel and slander. Libel consists of any defamation that can be seen, most typically in writing. Slander consists of an oral defamatory communications. The elements of libel and slander are nearly identical to one another.

Historically, the law governing slander focused on oral statements that were demeaning to others. By the 1500s, English courts treated slander actions as those for damages. Libel developed differently, however. English printers were required to be licensed by and give a bond to the government because the printed word was

believed to be a threat to political stability. Libel included any criticism of the English government, and a person who committed libel committed a crime. This history carried over in part to the United States, where Congress under the presidency of John Adams passed the Sedition Act, which made it a crime to criticize the government. Congress and the courts eventually abandoned this approach to libel, and the law of libel is now focuses on recovery of damages in civil cases.

Beginning with the landmark decision in *New York Times v. Sullivan* (1964), the U.S. Supreme Court has recognized that the law of defamation has a constitutional dimension. Under this case and subsequent cases, the Court has balanced individual interests in reputation with the interests of free speech among society. This approach has altered the rules governing libel and slander, especially where a communication is about a public official or figure, or where the communication is about

a matter of public concern.

PROVING DEFAMATION

Defamation is an act of communication that causes someone to be shamed, ridiculed, held in contempt, lowered in the estimation of the community, or to lose employment status or earnings or otherwise suffer a damaged reputation. Such defamation is couched in 'defamatory language'. Libel and slander are subcategories of defamation. Defamation is primarily covered under state law, but is subject to First Amendment guarantees of free speech. The scope of constitutional protection extends to statements of opinion on matters of public concern that do not contain or imply a provable factual assertion.

In order to prove defamation, the plaintiff must prove:

- that a statement was made about the plaintiff's reputation, honesty or integrity that is not true;
- publication to a third party (i.e., another

person hears or reads the statement); and
■the plaintiff suffers damages as a result of the statement.

Examples of defamatory statements are virtually limitless and may include any of the following:

- The communication that imputes a serious crime involving moral turpitude or a felony
- A communication that exposes a plaintiff to hatred
- A communication that reflects negatively on the plaintiff's character, morality, or integrity
- A communication that impairs the plaintiff's financial well-being
- A communication that suggests that the plaintiff suffers from a physical or mental defect that would cause others to refrain from associating with the plaintiff.

One question with which courts have struggled is how to determine which standard should govern whether a statement is defamatory. Many statements may be viewed as defamatory by some individuals, but the same statement may not be viewed as

defamatory by others. In some instances, the context of a statement may determine whether the statement is defamatory. The Restatement provides as follows: "The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express." Courts generally will take into account extrinsic facts and circumstances in determining the meaning of the statement. Thus, even where two statements are identical in their words, one may be defamatory while the other is not, depending on the context of the statements.

In a defamation action, the recipient of a communication must understand that the defendant intended to refer to the plaintiff in the communication. Even where the recipient mistakenly believes that a communication refers to the plaintiff, this belief, so long as it is reasonable, is sufficient. It is not necessary that the communication refer to the plaintiff by name. A defendant may publish defamatory

material in the form of a story or novel that apparently refers only to fictitious characters, where a reasonable person would understand that a particular character actually refers to the plaintiff. This is true even if the author states that he or she intends for the work to be fictional.

In some circumstances, an author who publishes defamatory matter about a group or class of persons may be liable to an individual member of the group or class. This may occur when: (1) the communication refers to a group or class so small that a reader or listener can reasonably understand that the matter refers to the plaintiff; and (2) the reader or listener can reasonably conclude that the communication refers to the individual based on the circumstances of the publication.

Generally, courts require a plaintiff to prove that he or she has been defamed in the eyes of the community or within a defined group within the community. Juries usually decide this question.

Defamation is a difficult wrong to prove, as there are various factors that are to be taken into consideration. The court must evaluate the defendant's investigation, or lack thereof, concerning the accuracy of the statement. How thoroughly the investigation was handled will reflect upon the nature and interest of the person who communicated the statement. Generally, defamation damages will not be awarded if the defendant had an honest but yet mistaken belief in the truth of the statement. The amount of damages that can be awarded is a matter of subjective determination for the court, based on all the facts and circumstances in each case.

Another requirement in libel and slander cases is that the defendant must have published defamatory information about the plaintiff. Publication certainly includes traditional forms, such as communications included in books, newspapers, and magazines, but it also

includes oral remarks. So long as the person to whom a statement has been communicated can understand the meaning of the statement, courts will generally find that the statement has been published.

FAULT

At common law, once a plaintiff proved that a statement was defamatory, the court presumed that the statement was false. The rules did not require that the defendant know that the statement was false or defamatory in nature. The only requirement was that the defendant must have intentionally or negligently published the information.

In *New York Times v. Sullivan*, the Supreme Court recognized that the strict liability rules in defamation cases would lead to undesirable results when members of the press report on the activities of public officials. Under the strict liability rules of common law, a public official would not have to prove that a reporter was aware that a particular statement about the official was false in order to recover from the reporter. This could have the effect of deterring members of the press from commenting on the activities of a public official.

Under the rules set forth in *Sullivan*, a public official cannot recover from a person who publishes a communication about a public official's conduct or fitness unless the defendant knew that the statement was false or acted in reckless disregard of the statements truth or falsity. This standard is referred to as "actual malice," although malice in this sense does not mean ill-will. Instead, the actual malice standard refers to the defendant's knowledge of the truth or falsity of the statement. Public officials generally include employees of the government who have responsibility over affairs of the government. In order for the First Amendment rule to apply to the public official, the communication must concern a matter related directly to the office.

Later cases expanded the rule to apply to public figures. A public figure is someone who has gained a significant degree of fame or notoriety in general or in the context of a particular issue or controversy. Even though these figures have no official role in government affairs, they often hold considerable influence over decisions made by the government or by the public. Examples of public figures are numerous and could include, for instance, celebrities, prominent athletes, or advocates who involve themselves in a public debate.

Where speech is directed at a person who is neither a public official nor a public figure, the case of *Gertz v. Robert Welsh, Inc.* (1974) and subsequent decisions have set forth different standards. The Court in *Gertz* determined that the actual malice standard established in *New York Times v. Sullivan* should not apply where speech concerns a private person. However, the Court also determined that the common law strict liability rules impermissibly burden publishers and broadcasters.

Under the Restatement (Second) of Torts, a defendant who publishes a false and defamatory communication about a private individual is liable to the individual only if the defendant acts with actual malice (applying the standard under *New York Times v. Sullivan*) or acts negligently in failing to ascertain whether a statement was false or defamatory.

DEFENSES TO DEFAMATION

Consent: Where a plaintiff consents to the publication of defamatory matter about

him or her, then this consent is a complete defense to a defamation action.

Truth:

Proving that the alleged defamatory statement is true will defend against claims for damages. The common law traditionally presumed that a statement was false once a plaintiff proved that the statement was defamatory. Under modern law, a plaintiff who is a public official or public figure must prove falsity as a prerequisite for recovery. Some states have likewise now provided that falsity is an element of defamation that any plaintiff must prove in order to recover. Where this is not a requirement, truth serves as an affirmative defense to an action for libel or slander.

A statement does not need to be literally true in order for this defense to be effective. Courts require that the statement is substantially true in order for the defense to apply. This means that even if the defendant states some facts that are

false, if the “gist” or “sting” of the communication is substantially true, then the defendant can rely on the defense.

Absolute Privilege:

Some statements, while libelous or slanderous, are absolutely privileged in the sense that the statements can be made without fear of a lawsuit for slander. The best example is a statement made in a court of law. An untrue statement made by a witness about a person in court which damages that person’s reputation will generally not cause liability to the witness as far as slander is concerned. However, if the statement is untrue, and the person knows the statement is untrue, the crime of perjury may have been committed.

Some defendants are protected from liability in a defamation action based on the defendant’s position or status. These privileges are referred to as absolute privileges and may also be considered immunities. In other words, the defense is not conditioned on the nature of the statement or upon the intent of the

actor in making a false statement. In recognizing these privileges, the law recognizes that certain officials should be shielded from liability in some instances.

Absolute privileges apply to the following proceedings and circumstances: (1) judicial proceedings; (2) legislative proceedings; (3) some executive statements and publications; (4) publications between spouses; and (5) publications required by law.

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Conditional Privilege: Other privileges do not arise as a result of the person making the communication, but rather arise from the particular occasion during which the statement was made. These privileges are known as conditional, or qualified, privileges. A defendant is not entitled to a conditional privilege without proving that the defendant meets the conditions established for the privilege. Generally, in order for a privilege to apply, the defendant must believe that a statement is true and, depending on the jurisdiction, either have reasonable grounds for believing that the statement was true or not have acted recklessly in ascertaining the truth or falsity of the statement.

Conditional privileges apply to the following types of communications:

■ A statement that is made for the protection of the publisher's interest

■ A statement that is made for the protection of the interests of a third person

■ A statement that is made for the protection of common interest

■ A statement that is made to ensure the well-being of a family member

■ A statement that is made where the person making the communication believes that the public interest requires communication of the statement to a public officer or other official

■ A statement that is made by an inferior state officer who is not entitled to an absolute privilege

Opinion:

Opinions are not defamatory without containing a factual assertion. Defamation requires that the statement contains specific facts that can be proved untrue. For example, "The waiters

and waitresses at Acme Restaurant are too slow and the food is too spicy." This is a statement of opinion. "I got food poisoning at Acme Restaurant" is potentially a defamatory statement if, in fact, the restaurant can prove that you never contracted food poison.

DEFAMATION PER SE

Damages for libel may be limited to actual damages unless there is malicious intent. It does not have to be proven that actual harm to your reputation occurred to collect damages for libel if it is defamatory per se, such as:

* The communication affects your business, trade or profession (loss of business, discharge, demotion, etc.),

* Implies you committed a crime,

* Leads on that you have a loathsome disease,

* Or suggests that you are somehow sexually impure.