



Legal Issues For Journalists #1
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Defamation, False Light & Invasion of Privacy

Presented by:

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Defamation

8 Elements to be Proven by a Plaintiff as a Result of New York Times v. Sullivan

Defamatory

False

Assertion of Fact

About the Plaintiff

Published

With Fault

Causing Damage

Without a Privilege for the Defendant

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Defamation

(Defamatory Element)

Something that reflects poorly on reputation, morality, integrity, etc.

Per se: state law says statement is defamatory on its face and damage is presumed to have occurred

Accusing someone of a crime or illegal activity (murderer, rapist)

Suggesting that a person is incompetent for his/her occupation

Impugning the chastity of a woman

Stating that a person has a “loathsome” disease

Per quod: when statement is defamatory in context and we must see how the public reacted

Remember: plaintiff must have a reputation to begin with

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Defamation

(False Element)

| | Public Figure Plaintiff | Private Figure Plaintiff |
|--------------------------|---|---|
| Issue of Public Concern | Plaintiff must prove falsity by clear and convincing evidence | Plaintiff must prove falsity by preponderance of the evidence |
| Issue of Private Concern | Plaintiff must prove falsity by clear and convincing evidence | Plaintiff may not have to prove falsity but preponderance of the evidence applies |

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Defamation

(Assertion of Fact Element)

Is the statement (or implication) at issue a factual assertion?

Could it be proven true or false if all relevant facts were known?

Look at:

Precision and specificity of the statement (definite/indefinite)

Verifiability of the statement

Literary context of the statement

Type of publication

Style of writing

Intended audience

Public context of statement (is intention to discuss public issues)

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Defamation

(Falsity and Assertion of Fact Example)

Daniel Snyder Lawsuit:

That's the Dan Snyder Who Got Caught Forging Names As A Telemarketer With Snyder Communications

Mr. Snyder “Made A Great View Of the Potomac River For Himself By Going All Agent Orange on Federally Protected Lands” and “Cut Down Trees Protected By The National Park Service”

“Tossed Off” The Six Flags Board

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Defamation

(Identification)

Who can sue?

Any living person or corporation who is identifiable in a published work

Direct ID:

Named or shown in an article or picture

Ever wonder why so many criminals are identified by three names?

Indirect ID:

Sufficient facts so a person can figure out to whom the speaker is referring

NY Times v. Sullivan (advertisement named only a government policy and the suit was brought by the city commissioner)

Group Defamation

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Defamation

(Publication)

Revealing info to any third party (anyone other than plaintiff)

Does not require publication in mass media, although publication in mass media is definitely “publishing”

Publishers & broadcasters who control content are liable for republishing defamatory statements

The fact that a source made the statement is NOT a defense from the element of publication

Repeating a statement carries the same consequence as originating the statement

Common carriers (telephones) and ISPs who don't control content are usually not liable for transmitting a defamatory statement

What about “liking” or “retweeting” a statement?

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Defamation

(Fault)

Plaintiff must prove that the defendant acted with fault, but the type of fault depends on who the plaintiff is

The two main types of fault are “actual malice” and “negligence.”

Actual malice (Public Official or Public Figure)

Defined as knowledge of falsity or reckless disregard of the truth

Difficult to prove, so this standard tends to favor defendant and protect expression, even if it's sometimes wrong

Negligence

Failure to act with reasonable care

Favors plaintiff because it is easy to argue a defendant could have been more careful or taken additional steps to verify truth of the statement

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Public or Private?



Public Officials/Public Figures have assumed special roles in society and special prominence in resolution of public questions



These people have greater access to the media to defend themselves



In many cases, they have voluntarily exposed themselves to risk of injury from defamatory falsehood

Private Figure = Negligence



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Defamation

(Actual Malice)

A statement is made with actual malice if the writer or speaker has **knowledge that it was false or made it with reckless disregard to its truth or falsity**

This must be proven by **clear and convincing evidence**

Examples:

Purposeful failure to interview a person with opposing viewpoint

Using headline despite knowledge that readers might misinterpret it

Fabricating an interview and exaggerated facts

But: the Supreme Court has ruled that changing quotes, especially to correct grammar, syntax, etc, is not necessarily actual malice

It will be actual malice only if it substantially changes the quote and substantially increases the damage to the source's reputation

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Defamation

(Damages)

3 Kinds (all are potentially affected by Correction or Clarification Statutes):

Compensatory

Compensation for actual money loss or provable monetary injury

Usually must be shown before any other damages can be collected

Special

Sometimes known as “general” damages

Monetary compensation paid by publishers for injury to reputation, injured feelings, shame, hurt, humiliation, mental anguish

Punitive

Meant to punish

Often well out of proportion to the amount that is awarded for compensation

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Defamation

(Defenses)

Procedural Defenses (apply to defamation, false light and other claims)

Statute of Limitations

Jurisdiction

Section 230 of the Communications Decency Act

Substantive Defenses (apply only to defamation)

Fair and Accurate Report

Neutral Reportage

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Defamation

(Defenses)

Section 230 of the Communications Decency Act

Before 1996, inherent distinction between “Publisher” and “Distributor”

Liability hinged on whether the website operator took an active role in editing the content, with

Publisher = Author = Liability

Distributor = Library = Immunity

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Defamation

(Defenses)

Section 230 of the 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

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Defamation

(Defenses)

Section 230 of the Communications Decency Act

Applies to:

Defamation

False Light

Public Disclosure of Private Facts

Intentional Infliction of Emotional Distress

Negligent Publication

But not:

Federal Criminal Law (Obscenity)

Intellectual Property (Copyright/Trademark)

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Defamation

(Defenses)

Piercing the Section 230 Veil

When there is evidence that the company or an employee posted
the content

“Prompting the Poster”

Broken Promises

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Defamation

(Defenses)

Fair Report

Most states provide a defense to repeat statements made in court, hearings, legislative sessions, etc. without being liable for defamatory content

Some states limit this to press; others have no limits on who may use it

Some states require that the proceeding be an official government proceeding, such as a court hearing or legislative session; others extend this protection to any statement by a government official

Privilege applies as long as stories are fair & accurate

Means reporters need to be able to read & understand court orders & opinions to ensure they do not misstate the ruling

Must attribute statements properly

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Defamation

(Defenses)

Neutral Reportage

First adopted in 1977; still only accepted in a few jurisdictions (but number is growing)

If allowed, it applies to disputed issues that require specialized knowledge

The press may repeat questionable statements if certain conditions are met:

The statement is about a public figure (or limited purpose public figure)

The statement is about a disputed issue/controversy of public concern

The reporter does not have skill/info to determine which side is correct/lying

The dispute is accurately reported

The coverage is neutral; both sides are covered fairly

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False Light

Elements

Widespread dissemination

Of Highly Offensive

False Material

About the plaintiff

With knowledge of falsity or reckless disregard of the truth

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Defamation/False Light (False Light Example)

SPORTS REPORTERS SEEKING TO HOOK into a teleconference with University of Central Florida football coach George O'Leary got a little more action than they bargained for, according to an article in the Chicago Tribune.

When school officials handed out the phone number for reporters to gain access to the teleconference, they were off by one digit. Instead of getting the coach, reporters got another kind of fantasy league. According to a blog by an Orlando Sentinel staffer, the voice on the other line said, "Hi sexy, you've reached the one-on-one fantasy line."

The reporter hung up, rechecked the school news release again to make sure he hadn't typed in the wrong number, and dialed again. Instead, he got the same phone sex hotline, "complete with offers" that the blogger wrote, "I can't really post on this blog."

The culprit was the school's new director of athletic communications, who accidentally listed one digit incorrectly when he released the teleconference contact information. The September teleconference was postponed until the school could come up with a less personal connection.



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Publication of Private Facts

Elements

Widespread **publication**

About the plaintiff

Of **private** information

That would be **highly offensive** to a reasonable person

Is **not of legitimate public concern** (not newsworthy)

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Publication of Private Facts

Private Information

General areas of what is private -- you'll find it easiest if you analyze in this order

Public Records (truthful information lawfully obtained can't be punished)

Public Information (If it's already public, it can't be private)

Public Places (If you can see it, it can't be private)

Public Figures (If you're always in the public eye, does privacy diminish)

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Publication of Private Facts

Highly Offensive

More than just a private fact

Something that:

Would tend to embarrass, hurt, injure or lower reputation

So much so, that you don't just want it to remain private, you would *actively seek to keep it private*

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Publication of Private Facts

Highly Offensive (Non-Exhaustive List)

Mental and Emotional Condition, including grief

Physical Health (medical records)

Love and Sexual relations, including sexual orientation

Decisions regarding procreation and abortion

Family relationships

Victimization (being a victim of violent or sexual assault)

Intense and close knit associational memberships and affiliations

Deep personal beliefs, such as religious conviction

Personal financial matters

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Publication of Private Facts

Not Newsworthy

Social Value of the Facts Published

Depth of the Intrusion

Extent to which the person acceded to the position of notoriety

Is there a relationship between the social value of the story and the private facts or are they just added for titillation

Was the private fact included for its own sake or was it included to advance the report

“The line is to be drawn when publicity ceases to be the giving of information to which the public is entitled and becomes a morbid and sensational prying into private lives for its own sake to a point where a reasonable member of society, with decent standards, would say he has no concern”

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Thank You

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