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WHO HAS THE LAST LAUGH? A LOOK AT DEFAMATION IN HUMOR

Sticks and stones may break our bones, but names can never hurt us. Or can they? This casenote discusses the difficulties courts have in determining when jokes are not funny and when names may break bones. It further discusses why juries rather than judges should determine when funny is funny and when it is not. We all have a funny-bone but there is always some point at which the tickle becomes a scratch.

Section 559 of the Restatement (Second) of Torts provides that "a communication is defamatory if it tends so to harm the reputation of another as to lower him in the esteem of the community or to deter third persons from association in dealing with him."¹ Actions in which private figure plaintiffs allege defamation within a humorous context present unique problems which require special consideration. One such case is *Mendelson v. Carson*.² In *Carson*, Michael Mendelson, a dentist, brought suit against Carson alleging libel, invasion of privacy, and intentional infliction of emotional distress. Mendelson based his claims on a comedy skit performed by Johnny Carson on the Tonight Show.³ The court held that Carson's statements were not defamatory as a matter of law,⁴ and that Mendelson's claims for emotional distress⁵ and invasion of privacy⁶ were factually unsupported. Accordingly, the court granted Carson's motion to dismiss.⁷

I. *MENDELSON V. CARSON*

In a Tonight Show monologue, aired April 18, 1986, Johnny Carson commented on a report that dentists in the United States were going out of business due to improved dental techniques. Carson stated: "I haven't been so happy about a group disbanding since the Gestapo."⁸ In response, Mendelson wrote a letter to Carson expressing displeasure with the comparison drawn between dentists and the Gestapo. Mendelson

1. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

2. N.Y.L.J., Feb. 4, 1988, at 13, col. 1.

3. *Id.*

4. *Id.* at 13, col. 3.

5. *Id.*

6. N.Y.L.J., Feb. 4, 1988, at 13, col. 3.

7. *Id.* at 13, col. 3. This Note addresses only the issues involved in the defamation cause of action.

8. *Id.* at 13, col. 1.

wrote that Carson's joke "resorted to the anachronistic and damaging myth of a dental appointment as a sadomasochistic vaudeville act as an easy way to amuse your audience."⁹ Mendelson demanded a "smirk-free public apology."¹⁰

Several weeks later, Carson responded to Mendelson's letter on the Tonight Show.¹¹ The following, a portion of Carson's actual response, is the basis upon which Mendelson brought suit.

JOHNNY CARSON: Well all right, Dr. Mendelson. I didn't mean to compare dentists as individuals to the Gestapo. I was saying we're a little apprehensive about going to the dentist . . . you have to have a little sense of humor. So, I'm glad you sent me this letter, Mr. Mendelson, because it's a chance to do the second segment of this.

I think the Governor of Nevada was the first recipient of this award—Governor Bryant of Nevada—and Mr. Mendelson the second. So we say: Lighten Up Michael Mendelson, D.D.S. [Carson goes to podium in front of a marquis bearing the name: Michael Mendelson, D.D.S.]

JOHNNY CARSON: Dr. Mendelson, may I call you Michael? Far be it from me to criticize the noble profession of dentistry which has a long and honorable tradition dating back to the Spanish Inquisition. Michael, there is only one phrase Americans fear more than nuclear war and that phrase is: "root canal." What better way to spend an afternoon than reclining in a dentist's chair listening to a 6,000 r.p.m. high speed drill, smelling your tooth enamel burn as clouds of smoke billow out of your mouth. . . .

In closing, dentists are dedicated, highly trained, hard working professionals and a dentist takes off only three days a year. Christmas, Thanksgiving and the Marquis de Sade's birthday. So, lighten up Michael Mendelson, D.D.S.

Thank you.¹²

Mendelson alleged that the lighted marquis which displayed his

9. *Id.*

10. *Id.*

11. N.Y.L.J., Feb. 4, 1988, at 13, col. 1.

12. *Id.* at 13, col. 1-2. The following is the entire transcript:

JOHNNY CARSON: Now a few weeks ago—we've done this once before, this segment—I told a joke in a monologue, and I'm going to tell you the joke. First of all, humor is relative, you know, depending on how you receive something—it's funny to you or not. The joke was like this: I said, "According to a recent business report, dentists in the United States are going out of business due to improvements in

name and professional designation throughout the entire skit, together with Carson's remarks, were defamatory personal attacks that subjected

dental techniques and in the use of fluoride." I said, "Imagine dentists going out of business. I haven't been so happy about a group disbanding since the Gestapo."

JOHNNY CARSON: Well obviously I think anybody who has a sense of humor or is reasonable didn't think that I was equating dentists as human beings as members of a racist band. What I was trying to say, and maybe didn't do it too well, was that people are apprehensive about going to the dentist. They wouldn't want to face the Gestapo. I could have probably said "Attila the Hun and his group" broke up too, right.

JOHNNY CARSON: How many of you enjoy, for example, going to the dentist [light applause] No, I'm serious, now. How many of you had a dental appointment tomorrow and it cleared up tonight, wouldn't go in tomorrow? [loud applause] Anyway, I received a letter after that joke from a Dr. Michael Mendelson, who happens to be a dentist.

ED McMAHON: He was not happy.

JOHNNY CARSON: Not happy.

"Dear Mr. Carson: I was shocked and angered this evening to hear your disgusting comparison to the declining economic well-being of America's dentists to the Gestapo being disbanded."

JOHNNY CARSON: I didn't mean that you know.

"To compare this same group of doctors to a gang of sadistic and bigoted thugs is ludicrous."

JOHNNY CARSON: Of course it is. I had to go to my dentist the next day, Ray Jacobson, and he came in with one of those little picks and said: "Pretty funny last night." But he understood that we meant it in good humor. Dr. Mendelson goes on:

"Perhaps you feel that dentists as a group are too serious, that they have no sense of humor. The general public shows a lack of understanding that dentistry is a sophisticated and demanding health care field. It is sad that you've resorted to the anachronistic and damaging myth of a dental appointment as a sadomasochistic vaudeville act as a easy way to amuse your audience. I assume a smirk-free public apology is forthcoming."

JOHNNY CARSON: Well all right, Dr. Mendelson. I didn't mean to compare dentists as individuals to the Gestapo. I was saying we're a little apprehensive about going to the dentist. You have to have a little sense of humor. So, I'm glad you sent me this letter, Mr. Mendelson, because it's a chance to do the second segment of this.

I think the Governor of Nevada was the first recipient of this award—Governor Bryant of Nevada—and Mr. Mendelson the second. So we say: Lighten Up Michael Mendelson, D.D.S. [Carson goes to podium in front of marquis bearing the name: Michael Mendelson, D.D.S.]

JOHNNY CARSON: Dr. Mendelson, may I call you Michael? Far be it from me to criticize the noble profession of dentistry which has a long and honorable tradition dating back to the Spanish Inquisition. Michael, there is only one phrase Americans fear more than nuclear war and that phrase is: "root canal." What better way to spend an afternoon than reclining in a dentist's chair listening to a 6,000 r.p.m. high speed drill, smelling your tooth enamel burn as clouds of smoke billow out of your mouth.

JOHNNY CARSON: Yes, Mike, dentists say that x-rays are safe, that you get more radiation from the sun. Oh really? How many people do you see lying on the beach of Santa Monica with lead aprons on their laps? Dentists serve a vital purpose in our society. Were it not for dentists, we would never have the opportunity to look up a grown man's nose.

Michael, I won't say that dentists are kinky, but how many other people do you know who get their jollies sticking a tiny mirror in a truck driver's mouth to look at a piece of pork sausage caught on his molar?

Mike, you're a member of a privileged profession. There are only two groups of

him to ridicule from the community.¹³

Carson moved to dismiss for failure to state a cause of action.¹⁴ He asserted that his statements were neutral, an expression of his opinion, and generalized, rather than statements "of and concerning" Mendelson.¹⁵ Carson further stated that even if his remarks were directed at Mendelson, they were merely satirical, comedic exaggerations and hyperbole which could not be taken literally or reasonably be considered statements of fact.¹⁶

The New York Supreme Court began its inquiry by assuming that Carson's statements were directed at Mendelson. After viewing a videotape of the monologue in question, the court concluded that the dentistry sequence may have been "of and concerning" Mendelson.¹⁷ The court based this determination on the prominently displayed marquis and Carson's references to Mendelson. However, the court noted that this alone would not support a defamation claim.¹⁸ The court explained that if the dentistry sequence was reasonably susceptible of a defamatory connotation, the case would be sent to a jury to determine whether Mendelson was defamed. Otherwise, the court would dismiss the case.¹⁹ The court explained that for statements to be defamatory, they must be examined in the context of the entire show. Further, the court must test statements against the understanding of the average listener without applying any strained or artificial construction²⁰ and must bear in mind the temper of

professionals that spend their working days watching water go round and round in a little bowl. Dentists and men's rooms attendants.

Yes, Doctor, in recent years there have been advancements in dentistry—stereo headphones for patients to wear, quieter drills but there's one new advance that dentists should try for themselves: breath mints. That's right. The only thing that smells worse than a dentist's breath is riding in a car pool with six wet grizzly bears.

As you know Mickey, women think dentists are romantic. What lady wouldn't want to be embraced by a man whose shirt sleeves are soggy with a stranger's saliva?

In closing, dentists are dedicated, highly trained, hard working professionals and a dentist takes off only three days a year. Christmas, Thanksgiving and the Marquis de Sade's birthday. So, lighten up Michael Mendelson, D.D.S.

Thank you. [Carson seats himself again at his desk]

JOHNNY CARSON: Now there was no smirking there.

ED McMAHON: No smirking.

JOHNNY CARSON: You know, I have to go to the dentist next week. Oh Boy.

13. *Id.* at 13, col. 2.

14. *Id.*

15. *Id.*

16. N.Y.L.J., Feb. 4, 1988, at 13, col. 2.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

the times.²¹ At this point, however, the court did not decide whether these statements were capable of a defamatory meaning.

The court next discussed the first amendment protection of opinion, noting that "there is no such thing as a false idea."²² Thus, since defamation has an element of falsity to it, an opinion cannot be defamatory.²³ The court reasoned that the skit was not actionable to the extent that it reflected Carson's view that Mendelson took his profession too seriously and should "lighten up," since it represented an opinion.²⁴ However, the court noted that "humor and comedy are not synonymous with opinion, and as such, they are not subject to the blanket first amendment protections granted opinions."²⁵ The court stated: "mere jest will not justify an assault on the reputation and business of another unless it is clear that it in no way could be viewed as an attack on the person to whom it related."²⁶ The court recognized that rhetorical hyperbole and statements that are "patently humorous, devoid of serious meaning or intent, and impossible of being reasonably understood otherwise"²⁷ would not sustain a defamation action. Further, the court specified that the key determination was whether the remarks gave the impression that they were true.²⁸

Applying these principles to *Carson*, the court noted that the routine was part of a larger comedic performance that has existed nightly for twenty-five years and is known to consist of "commentary containing irony, satire, exaggeration and rhetorical hyperbole on contemporary events and day-to-day concerns."²⁹ The court also noted that at the beginning of the sequence, Carson directed Mendelson and the audience not to take the remarks seriously and indicated that levity was the intent of the skit.³⁰ The court concluded that the skit contained gross exaggerations and nonsensical statements that were comedic, not malicious, and that persons hearing the routine could not possibly take it seriously.³¹

21. N.Y.L.J., Feb. 4, 1988, at 13, col. 2.

22. *Id.*

23. *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974)).

24. *Id.* at 13, col. 2.

25. *Id.* (quoting *Frank v. National Broadcasting Co., Inc.*, 119 A.D.2d 252, 257, 506 N.Y.S.2d 869, 872 (1986)).

26. *Id.* (quoting *Triggs v. Sun Printing & Publishing Ass'n*, 179 N.Y. 144, 155, 71 N.E. 739, 743 (1904)).

27. N.Y.L.J., Feb. 4, 1988, at 13, col. 2.

28. *Id.* at 13, col. 2-3.

29. *Id.* at 13, col. 3.

30. *Id.* It is apparent from the transcript of the Carson skit, that Carson did not direct Mendelson or the audience to not take the remarks seriously nor did he state that levity was the intent of the skit. *Id.* at 13, col. 1-2.

31. N.Y.L.J., Feb. 4, 1988, at 13, col. 2.

Accordingly, the court decided the statements were not defamatory as a matter of law and dismissed the libel action.³²

II. BALANCING THE COMPETING INTERESTS

A. Recognition Of The Value Of Humor And Its Limits

Although courts have recognized the value of humor in society,³³ they have been careful to emphasize that humor must have limits. In the well recognized 1831 decision of *Donoghue v. Hayes*, the court stated that the "principle is clear—a person shall not be allowed to murder another's reputation in jest. If a man in jest conveys a serious imputation, he jests at his peril."³⁴

The Second Circuit Court of Appeals followed this principle in *Burton v. Crowell Publishing Co.*³⁵ In that case, an advertisement for "Camel" cigarettes showed a photo of the plaintiff, a well-known steeple-chaser, posing for a weigh-in after a race. His saddle was situated in a way suggesting an obscene and grotesque representation.³⁶ The court found that although the photo was an optical illusion that carried its correction on its face, it portrayed the plaintiff as a "preposterously ridiculous spectacle." The court determined that the photo may have affected the plaintiff's reputation and exposed him to "more than trivial" ridicule.³⁷ The court stated that "not all ridicule or all disagreeable comment is actionable; a man must not be too thin-skinned or a self-important prig."³⁸ However, the court in holding that the picture was *prima facie* actionable,³⁹ acknowledged the appropriateness of limits on humor. The court reasoned that the advertisement was "more than what only a morbid person would not laugh off."⁴⁰

B. Private Figures' Rights To Not Be Defamed

In conjunction with the Supreme Court's recognition of the value of humor with limits, it has recognized that there is a legitimate state inter-

32. *Id.*

33. *See, e.g.*, *Burton v. Crowell Publishing Co.*, 82 F.2d 154, 155 (2d Cir. 1936); *Polygram Records, Inc. v. Superior Court*, 170 Cal. App. 3d 543, 553, 216 Cal. Rptr. 252, 258 (1985); *Frank v. National Broadcasting Co., Inc.*, 119 A.D.2d 252, 257, 506 N.Y.S.2d 869, 872 (1986).

34. *Triggs*, 179 N.Y. 144, 155, 71 N.E. at 743 (quoting *Donoghue v. Hayes* [1831], *Hayes, Irish Exchequer*, 265, 266).

35. 82 F.2d 154 (2d Cir. 1936).

36. *Id.* at 154.

37. *Id.* at 155.

38. *Id.*

39. *Burton*, 82 F.2d at 156.

40. *Id.* at 155.

est in compensating individuals for the harm inflicted by defamatory falsehoods.⁴¹ The Court, in *Gertz v. Robert Welch, Inc.*,⁴² stated that an individual's right to protect his own good name "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."⁴³

Further, the Court emphasized that private figure plaintiffs are more vulnerable to injury and require greater protection from defamation than public figure plaintiffs.⁴⁴ The Court reasoned that public figures have greater access to the press and other media, providing them with ample and effective means to refute negative or erroneous statements.⁴⁵ By contrast, private individuals have relatively few, if any, opportunities to obtain retractions or corrections.

Moreover, the Supreme Court suggested that those who seek prominence in the public arena must pay the price for their recognition by tolerating a certain amount of good and bad public commentary.⁴⁶ Easily distinguishable is the private figure who has neither sought, nor bargained for, a place amidst public debate, controversy, or scrutiny. Accordingly, the Court concluded "that the States should retain *substantial latitude* in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual."⁴⁷

C. Consideration Of Constitutional Rights

Although courts have emphasized the value of humor in society and an individual's right not to be defamed, there is an important countervailing factor that demands consideration—the first amendment rights of freedom of speech and of the press. The Supreme Court, in *Gertz*, stated that it was "especially anxious to assure to the freedoms of speech and press that breathing space essential to their fruitful exercise."⁴⁸ The result is a tension between the right of uninhibited speech and press, and the right of individuals to be free from defamation. Numerous courts have attempted to juggle these competing values; yet, courts appear to be no closer to easing the tension.

In defamation cases, where the added element of humor is introduced, this tension is accentuated. A possible explanation is that

41. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

42. *Id.*

43. *Id.* (citing *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966)(concurring opinion)).

44. *Gertz*, 418 U.S. at 344.

45. *Id.*

46. *Id.* at 345.

47. *Id.* at 345-46 (emphasis added).

48. *Id.* at 342 (citation omitted).

although courts are extolling the value and necessity of humor in society, they remain reluctant to define humor or even demarcate a line between what is humorous and what is defamatory.

In *Polygram Records, Inc. v. Superior Court*,⁴⁹ David Rege, a wine producer and distributor, brought suit against comedian Robin Williams for a joke Williams told during his nightclub comedy performance.⁵⁰ The California Court of Appeal held that the joke could not be taken seriously by any sensible person and thus, was not defamatory as a matter of law.⁵¹ The court noted that "to hold otherwise would run afoul of the First Amendment and chill the free speech rights of all comedy performers and humorists, to the genuine detriment of our society."⁵²

Although the *Polygram* court recognized "that humor is an important form of social commentary,"⁵³ it rejected Williams' contention that comedy, by definition, could not be taken seriously or literally, and thus, could never be actionable for defamation.⁵⁴ The court emphasized that comedy is as resistant to interpretation as the term "obscenity."⁵⁵ The court further stated that judicial reluctance to define humor should not distress advocates of the constitutional rights of comedians "for if judges assumed the responsibility to decide what is amusing and made the protections of the first amendment turn on their views, perhaps less putative humor would be safeguarded than our restrained approach permits."⁵⁶

III. THE STANDARDS ARE NOT STANDARD

Courts have placed different weight on the competing interests in defamation in humor cases. While this would not be unusual between different jurisdictions, courts within the same jurisdiction have not been any more consistent. This has resulted in the application of different standards, as well as the inconsistent application of similar standards.

49. 170 Cal. App. 3d 543, 216 Cal. Rptr. 252 (1985).

50. *Id.* at 546-47, 216 Cal. Rptr. at 253.

Whoa—White Wine. This is a little wine here. If it's not wine, it's been through somebody already. Oh.—There are White wines, there are Red wines, but why are there no Black wines like: Rege, a Motherfucker. It goes with fish, meat, any damn thing it wants to. I like my wine like I like my women, ready to pass out. Isn't it nice though, having someone like Mean Joe Green advertising it—You better buy this or I'll nail your ass to a tree.

Id.

51. *Id.* at 556-57, 216 Cal. Rptr. at 261. It is interesting to note that the court did not advance a definition for the term "sensible person."

52. *Id.* at 557, 216 Cal. Rptr. at 261.

53. *Id.* at 553, 216 Cal. Rptr. at 258.

54. *Id.* at 552-53, Cal. Rptr. at 257-58.

55. *Polygram*, 170 Cal. App. 3d at 553, 216 Cal. Rptr. at 258.

56. *Id.*

A. *Different Standards Used In New York*

The courts in New York have applied very different standards to not so different cases, and have reached inconsistent results. In *Matherson v. Marchello*,⁵⁷ a husband and wife brought suit against a group of musicians, "The Good Rats,"⁵⁸ alleging that the defendants made libelous statements during a radio interview.⁵⁹ The radio station aired a commercial advertising a party at OBI South, an establishment owned by the plaintiffs. Subsequently, The Good Rats engaged in an on-the-air discussion of why they were no longer allowed to play at the club. In doing so, they mentioned the Mathersons by name.⁶⁰ The Mathersons objected to The Good Rats' statement: "[W]e used to fool around with his wife . . . I don't think it was his wife that he got upset about, I think it was when somebody started messing around with his boyfriend that he really freaked out."⁶¹

The New York Supreme Court reversed the trial court's order granting the defendants' motion to dismiss the complaint for failure to state a cause of action.⁶² The court stated that if the contested statements were reasonably susceptible of a defamatory meaning, it would then be appropriate for a jury to decide whether defamation had occurred.⁶³ The court emphasized that the words must be given their natural meaning without straining "to interpret them in their mildest and most inoffensive sense in order to render them nondefamatory."⁶⁴ Thus, looking at the context in which the statements were made and the common usage of the words, the court could not find as a matter of law that the statements were nondefamatory. Accordingly, the court held that it was a matter for a jury.⁶⁵

The same court applied a different standard and reached a different result in *Frank v. National Broadcasting Co.*⁶⁶ In that case, Maurice Frank, an accountant, brought suit over a comedy segment aired on the late night television comedy program Saturday Night Live.⁶⁷ One day

57. 100 A.D.2d 233, 473 N.Y.S.2d 998 (A.D.2d 1984).

58. *Id.* at 234, 473 N.Y.S.2d at 1000. The suit was brought against The Good Rats as individuals and against their record company.

59. *Id.* at 234, 473 N.Y.S.2d at 1000.

60. *Id.*

61. *Id.*

62. *Matherson*, 100 A.D.2d at 234, 473 N.Y.S.2d at 1000.

63. *Id.* at 240, 473 N.Y.S.2d at 1004.

64. *Id.*

65. *Id.* at 242, 473 N.Y.S.2d at 1005.

66. 119 A.D.2d 252, 506 N.Y.S.2d 869 (1986).

67. *Id.* at 253, 506 N.Y.S.2d at 870.

prior to the deadline for filing income tax returns, Saturday Night Live broadcasted a comedy skit called "Fast Frank Feature."⁶⁸ A performer bearing a noticeable physical resemblance to the plaintiff was introduced as a tax consultant by the name of Maurice Frank.⁶⁹ The character gave absurd tax advice, such as suggesting that a houseplant be claimed as a dependent, advising that a rotten tomato in the refrigerator could be claimed as a "farm loss" for a frost ruined crop, and that acne medicine could be deducted as an "oil depletion allowance."⁷⁰

The New York Supreme Court Appellate Division determined that the purported tax advice was so nonsensical and silly that no sensible person could take the statements seriously.⁷¹ The court further concluded that the statements were neither "so malicious or vituperative that they would cause a person hearing them to hold the plaintiff in public contempt or disgrace."⁷² After viewing the alleged defamatory statements in context, the court held that as a matter of law the statements were not defamatory, and granted the defendant's motion to dismiss.⁷³

B. Identical Standards in New York with Inconsistent Results

Although some New York courts have applied the same standard under similar fact patterns, they have not yielded consistent decisions. In *Triggs v. Sun Printing & Publishing Association*,⁷⁴ the plaintiff, a university professor, complained of three libelous articles the defendant published which satirically portrayed the professor as a pompous and presumptuous literary freak.⁷⁵ The New York Court of Appeals⁷⁶ held that any fair-minded person reading the articles would conclude that they were harmful to the professor's reputation and tended to expose him to public shame and ridicule.⁷⁷ The court further stated that however desirable jest may be, amusement should not be provided at the expense of an individual's reputation or business.⁷⁸ It characterized the articles as scathing denunciations which transcended the limits of fair and honest

68. *Id.* at 254, 506 N.Y.S.2d at 870.

69. *Id.*

70. *Id.*, 506 N.Y.S.2d at 870-71.

71. *Frank*, 119 A.D.2d at 261, 506 N.Y.S.2d at 875.

72. *Id.*

73. *Id.*

74. 179 N.Y. 144, 71 N.E. 739 (1904).

75. *Id.* at 155, 71 N.E. at 742.

76. The New York Special Terms overruled a demurrer to the complaint and on appeal the New York Supreme Court, Appellate Division reversed. *Id.* at 156, 71 N.E. at 742.

77. *Id.* at 153-54, 71 N.E. at 742.

78. *Id.* at 155, 71 N.E. at 742-43.

criticism. As such, they were clearly actionable.⁷⁹

By contrast, the court in *Lamberti v. Sun Printing & Publishing Association*,⁸⁰ applied the same standard as that applied in *Triggs*, yet, reached an opposite result.⁸¹ In *Lamberti*, the action for libel was in response to an article published in the defendant's newspaper describing a joke played on Lamberti, the plaintiff. A group of Lamberti's friends convinced him that he had an imprint of a black hand on his back, signifying his membership in the "Black Hand Kidnappers."⁸² Though the article revealed that the incident was merely a prank, the plaintiff alleged that the story implied he was a member of a secret society composed of assassins, murderers, blackmailers, thieves and kidnappers.⁸³ At the time of publication, the press, particularly in New York, were reporting numerous crimes allegedly committed by the same secret society. Therefore, the court found the Black Hand Kidnappers had an exceptionally high public profile.⁸⁴ The court stated that any fair-minded person would not regard the article as an attack on the plaintiff, but rather as a practical joke which impaired neither the plaintiff's reputation nor his affairs.⁸⁵ Accordingly, the New York Supreme Court held that the lower court appropriately granted the defendant's demurrer.⁸⁶

C. *Inconsistent Application of Standards in Federal Courts*

While some state courts have relied on federal court standards, the federal courts as well have not been able to come up with a uniform standard. In *Martin v. Municipal Publications*,⁸⁷ the defendant's Philadelphia Magazine published a photograph of the plaintiff wearing his "Mummer's" costume.⁸⁸ The caption appearing below the picture stated "A New Year's tribute here to all the ostriches who gave their tails to make the world free for closet transvestites from South Philly to get themselves stinking drunk."⁸⁹ Although the photograph and caption ap-

79. *Triggs*, 179 N.Y. at 156, N.E. at 742-43.

80. 111 A.D. 437, 97 N.Y.S. 694 (1906).

81. The standard in both *Triggs* and *Lamberti* was, in essence, whether a fair-minded person would regard the communication as harmful to the plaintiff's reputation. See *Triggs*, 179 N.Y. at 153-54, 71 N.E. at 742; *Lamberti*, 111 A.D. at 441, 97 N.Y.S. at 695.

82. 111 A.D. at 438-39, 97 N.Y.S. at 695.

83. *Id.* at 439, 97 N.Y.S. at 694.

84. *Id.*, 97 N.Y.S. at 695.

85. *Id.* at 442, 97 N.Y.S. at 696.

86. *Id.*, 97 N.Y.S. at 695.

87. 510 F. Supp. 255 (E.D. Pa. 1981).

88. *Id.* at 257 n.1. Plaintiff marched in the 1978 New Year's Day Philadelphia Mummies Parade as a member of the Hegeman String Band.

89. *Id.* at 257.

peared in a section of the magazine known for parody, satire and light humor,⁹⁰ the plaintiff brought a libel action.

In determining whether the challenged communication was capable of a defamatory meaning, the United States District Court for the Eastern District of Pennsylvania considered whether it potentially harmed the plaintiff's reputation in the community or deterred others from associating with him.⁹¹ The court was not persuaded by the defendant's argument that reasonable people would not take the picture and caption seriously. The court reasoned that although the picture and caption appeared in the humor section of the magazine, readers may have seen the photo but were unfamiliar with the magazine or its humor section.⁹² Consequently, the court held that the photograph and caption could not be deemed incapable of a defamatory meaning as a matter of law.⁹³ Accordingly, the court denied the defendant's motion for summary judgment.⁹⁴

In *Pring v. Penthouse International, Ltd.*,⁹⁵ the controversy centered on a Penthouse magazine spoof of the Miss Wyoming contestant at the Miss America contest.⁹⁶ The article described Miss Wyoming performing physically impossible sexual acts and fantasizing about bizarre sexual incidents while competing in the pageant.⁹⁷ The plaintiff, who was Miss Wyoming, charged Penthouse with defamation.⁹⁸ In reversing the jury's decision, the Tenth Circuit Court of Appeals held as a matter of law that the descriptions in the article were merely rhetorical hyperbole and pure fantasy, both of which are protected by the first amendment.⁹⁹ Judge Breitenstein, in dissent, stated that although the article was characterized as humor in the table of contents,¹⁰⁰ readers could find that it exhibited sexual deviation, perversion, and defamed the plaintiff by placing her in a false light.¹⁰¹ Judge Breitenstein also stated that the case should not have been decided as a matter of law.¹⁰² Further, he stated that the article contained both fact and fiction, that Penthouse did not present the article

90. *Id.* at 258.

91. *Id.*

92. *Martin*, 510 F. Supp. at 258.

93. *Id.*

94. *Id.* at 259.

95. 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

96. *Id.* at 439.

97. *Id.* at 440-41.

98. *Id.* at 439.

99. *Id.* at 443.

100. *Pring*, 695 F.2d at 444 (Breitenstein, dissenting).

101. *Id.*

102. *Id.* at 445.

as fiction, characterizing it instead as humor, and that there was not a disclaimer of reference to any living or dead person.¹⁰³ Accordingly, he agreed with the jury's conclusion that a reasonable person would understand that the article referred to the plaintiff, was false and defamatory, and that it would damage the plaintiff's reputation.¹⁰⁴

D. *Reliance On Standards From Outside Jurisdictions*

A number of courts, in both federal and state cases, have engaged in a type of "jurisdiction-hopping": citing standards from cases in other jurisdictions as support for their decisions. In *Frank*, a New York decision, the court referred to standards from federal cases from New York and Wyoming, and a California case.¹⁰⁵

In *Burton*, a federal case from New York, the court stated a standard and then qualified it by citing a New York case.¹⁰⁶ Additionally, in the California case *Polygram*, the court relied on a federal case from Wyoming as support for its standard.¹⁰⁷ Following suit, the *Carson* court relied on standards from a California decision and from a federal case from Wyoming.¹⁰⁸

The practice of relying on nonbinding authority implies a lack of adequate standards, and the discomfort judges have with the current standards. Consequently, courts are applying different standards in an inconsistent manner.

E. *Current Status Of Defamation Standards*

In addition to applying inconsistent standards, the courts have relied on an array of nonuniform, unclearly defined, and ambiguous standards. This has resulted in considerably subjective and inconsistent applications to determine when humor is, or can be, defamatory.

The cases examined illustrate that courts have looked to a multitude of standards such as: 1) whether "fair-minded" (an undefined term) peo-

103. *Id.* at 444.

104. *Id.*

105. *Frank v. National Broadcasting Co., Inc.* 119 A.D.2d 252, 257, 506 N.Y.S.2d 869, 875 (1986). The three cases the court relied on were *Burton v. Crowell Publishing Co.*, 82 F.2d 154 (2d Cir. 1936); *Pring v. Penthouse International, Ltd.*, 695 F.2d 438 (10th Cir. 1982); *Polygram Records, Inc. v. Superior Court*, 170 Cal. App. 3d 543, 216 Cal. Rptr. 252 (1985).

106. *Burton v. Crowell Publishing Co.*, 82 F.2d 154, 155 (2d Cir. 1936). The case the court relied upon was *Lamberti v. Sun Printing & Publishing Ass'n*, 111 A.D. 437, 97 N.Y.S. 694 (1906).

107. *Polygram Records, Inc. v. Superior Court*, 170 Cal. App. 3d 543, 557, 216 Cal. Rptr. 252, 261 (1985). The court relied on *Pring*, 695 F.2d 438.

108. N.Y.L.J., Feb. 4, 1988, at 13, col. 2-3. The court cited *Polygram*, 170 Cal. App. 3d 543, 216 Cal. Rptr. 252 and *Pring*, 695 F.2d 438, *cert. denied*, 462 U.S. 1132 (1983).

ple would conclude that the statements were injurious to the plaintiff's reputation and exposed him to public shame and ridicule;¹⁰⁹ 2) whether the statements could be regarded as an attack;¹¹⁰ 3) whether "sensible" people would take the statements seriously;¹¹¹ 4) whether the statements were so nonsensical and silly that no person would believe them;¹¹² 5) if the statements were malicious or vituperative and if so, whether listeners would hold the plaintiff in public contempt or disgrace;¹¹³ and the catch-all 6) whether the statements could be reasonably susceptible to a defamatory meaning.¹¹⁴

IV. THE PROBLEMS IN DEFAMATION IN HUMOR ACTIONS

As a result of the courts' inability to deal with defamation in humor, several problems have arisen. Initially, the courts have reached different and inconsistent standards in according different weights to the competing interests of an individual's right not to be defamed, the societal value of humor, and constitutional guarantees of free speech and press. In turn, this has resulted in inconsistent results in factually similar cases.

The inherently subjective nature of humor combined with the subjective method courts use to formulate their standards further compounds the problem. While courts may agree that humor is subjective and cannot or should not be judicially defined,¹¹⁵ judges still must initially determine whether a humorous communication is reasonably susceptible to a defamatory meaning, and therefore, actionable.

There are no set standards with which to guide judges in making these determinations. Judges' personal sentiments regarding humor will determine which plaintiffs were potentially defamed and which plaintiffs were not defamed. Consequently, a plaintiff's opportunity to have a jury hear his or her case will subjectively rest solely on the judge's predisposition.

The reasons for this are largely a result of the highly subjective ele-

109. *Triggs v. Sun Printing & Publishing Ass'n*, 179 N.Y. 144, 153-54, 71 N.E. 739, 742 (1904).

110. *Lamberti v. Sun Printing & Publishing Ass'n*, 111 A.D. 437, 441, 97 N.Y.S. 694, 696 (1906).

111. *Polygram*, 170 Cal. App. 3d at 557, 216 Cal. Rptr. at 261.

112. *Frank*, 100 A.D.2d at 261, 506 N.Y.S.2d at 875.

113. *Id.*

114. *Matherson v. Marchello*, 100 A.D.2d 233, 240, 473 N.Y.S.2d 998, 1004 (1984) (quoting *James v. Gannett Co.*, 386 N.Y.S.2d 871, 353 N.E.2d 834 (1976)).

115. The *Polygram* court noted that there may well be an "unpredictability of judicial endeavors to manage the mysteries of humor"—resulting to a great degree "from the interposition of value judgments." 170 Cal. App. 3d at 553 n.13, 216 Cal. Rptr. at 258 n.13.

ments at issue in defamation in humor actions, as well as a lack of standards to guide the courts. When these factors are added to the overwhelming constitutional considerations, plaintiffs' rights to protect their reputations have been minimized.

V. ANALYZING THE *CARSON* COURT'S APPROACH

The *Carson* opinion exemplifies unresolved problems of how to objectively and equitably determine when humor becomes defamation. While the conclusion that Carson's dentistry skit was not defamatory may ultimately have been the appropriate outcome, the court used a haphazard method of analysis to justify its holding.

The court dismissed the first amendment's protection of opinions by stating that Carson's remarks are protected to the extent that they reflect his attitude that Mendelson should "lighten up."¹¹⁶ The court noted that humor and comedy, not being synonymous with opinion,¹¹⁷ cannot be given the same blanket first amendment protection. However, the court did not specify which portions of Carson's skit were opinion and which were not. This leaves the impression that the court was aware that an important constitutional consideration was lurking, but was not quite certain as to its application.

The court then proceeded to string together five vague and ambiguous standards from past defamation cases,¹¹⁸ without any analysis or commentary. Again, the court recognized that these standards may have some relevance to the case, but did not connect them to *Carson*. This approach exhibits the judge's lack of confidence in these standards, as well as an uncertainty of whether, and how, to pick and choose among them.

The court, citing *Frank*, listed a sixth standard stating that the manner in which humorous statements will be viewed will depend upon the context in which they were delivered.¹¹⁹ Unfortunately, the "analysis" that followed relied heavily on *Frank*. In fact, the court used that decision as a "fill-in-the-blanks" opinion—using virtually the same verbiage and replacing only the particulars.¹²⁰ Like *Frank*, the *Carson* court

116. N.Y.L.J., Feb. 4, 1988, at 13, col. 2.

117. *Id.*

118. *Id.*

119. *Id.* at 13, col. 3

120. For example, the court in *Frank* stated: "No person who has ever had the dubious pleasure of filling out a 1040 Federal tax form would . . . believe that he could claim his favorite Boston Fern as a dependent." *Frank*, 506 N.Y.S.2d at 874-75. From the *Carson* opinion we get "No person who has ever had the dubious pleasure of spending hours in a dentist's chair would equate root canal . . . with nuclear holocaust." N.Y.L.J., Feb. 4, 1988, at

looked to the nature of the performance and the fact that Johnny Carson has performed nightly for over twenty-five years. Based on these facts, the court reasoned that the skit was "devoid of serious meaning or intent,"¹²¹ and was incapable of being construed otherwise.

This type of reasoning appears grossly unfair to Mendelson or any other plaintiff who brings a suit against a well-known entertainer. The court implied that Johnny Carson's stature as a comedian, made it unlikely, if not impossible, for Carson to make defamatory remarks during the Tonight Show. This subjectivity and bias precluded Mendelson from receiving fair consideration of his complaint. Further, by relying so heavily on *Frank*, the court displayed a reluctance to engage in a meaningful and original analysis. This implies that the court had predetermined the outcome and then sought to find applicable support. While such a method may not be uncommon, it illustrates the subjectivity involved in these types of actions.

The sketchy analysis in *Carson* makes it difficult to identify the court's reasoning and the factors upon which it based its decision. The superficial attention given to the competing interests provides no insight as to how they were balanced or whether they were even weighed. If set guidelines were available, the court may not have engaged in this type of subjective reasoning.

VI. A WORKABLE SOLUTION: ADOPTION OF OBJECTIVE CRITERIA

The courts' subjective methods for deciding when defamation in humor actions can go to the jury has produced random and unpredictable holdings. Without the use of stronger guidelines, judges will continue to look at comedy on an "I know it when I see it" basis. Plaintiffs will be at the mercy of a judge's personal values, sense of humor and mood. Judges need criteria to minimize the flaws in the current hit and miss approach. While it is not possible to remove subjectivity entirely, it can be greatly reduced.

The proposed criteria, applied collectively, require greater objectivity in a court's analysis. The courts will apply all the criteria in each case, rather than randomly selecting one or more standards on a case-by-case basis. In applying these criteria, judges will be able to consistently and more objectively determine whether a plaintiff has potentially been defamed. Thus, the criteria seek only to allow private figure plaintiffs full

13, col. 3. While looking at *Frank* and *Carson* side by side it is readily apparent that *Carson* is riddled with numerous similar examples and, in fact, mimics *Frank* in format as well as content.

121. N.Y.L.J., Feb. 4, 1988, at 13, col. 3.

legal recourse available in defamation actions. The guidelines suggested provide minimum standards for determining whether a defamation action will go to a jury.

First, the court should consider the *context* in which the alleged defamatory communication was made. In applying this criteria, the court should use a predominance standard; whether the context is recognized as predominately humorous.¹²² If the court determines the context is broadly recognized as predominately humorous, this would favor the defendant. *Second*, the statement must be unambiguously understood as being "*of and concerning the plaintiff.*"¹²³ If the plaintiff's name is not specifically mentioned, there must be enough references to him so that he is clearly *recognizable*. If there is no specific mention of the plaintiff, or he is not clearly recognizable by the statements, this would favor the defendant. *Third*, the statement must give rise to an *impression that it is true*.¹²⁴ The court must consider whether the statements are potentially capable of being true, as opposed to suggesting an impossibility or an unequivocal falsehood. When a court determines that statements may be potentially true, the plaintiff's case would be strengthened. *Finally*, the judge must determine if the communication is capable of more than one meaning; one of which can be construed as defamatory.¹²⁵ In other words, even though a statement may be construed in an inoffensive manner, a court must look to see *if an offensive construction is at all possible*. If the communication can be construed offensively, this will add weight to the plaintiff's complaint. The judge must regard the alleged defamatory communication in the same way that the public would perceive it.¹²⁶

Judges will retain the right to dismiss a cause of action if it fails to state a claim. It is not being suggested that this judicial province be eliminated, only that the factors determining whether motions to dismiss will be granted or denied be clarified. While a judge's decision to grant a motion to dismiss, demurrer or summary judgment effectively concludes as a matter of law that the plaintiff *has not been defamed*, the converse is

122. For example, the weekly show 60 Minutes is predominately recognized as a serious news reporting program, yet personality Andy Rooney does a purely satirical segment in the last five minutes of each broadcast. Under the first criterion, consideration of which portion of the program contained the alleged defamatory communication would be required.

123. See RESTATEMENT (SECOND) OF TORTS § 564 (1977).

124. Frank v. National Broadcasting Co., Inc., 100 A.D.2d 252, 257, 506 N.Y.S.2d 869, 873 (1986) (citing Triggs v. Sun Printing & Publishing Ass'n, 179 N.Y. 144, 71 N.E. at 742-43 (1904)).

125. See *Polygram*, 170 Cal. App. 3d at 551 (citing Arno v. Stewart, 245 Cal. App. 2d 955, 960, 54 Cal. Rptr. 392, 395 (1966)).

126. See *Sydney v. MacFadden Newspaper Publishing Corp.*, 242 N.Y. 208, 151 N.E. 209, 211 (1926).

not true. When a judge applies the proposed criteria and holds that a communication is reasonably susceptible of a defamatory meaning, the judge merely decides that the case may go to the jury. From there, the jury will resolve the issue of whether defamation occurred.

Comedians' first amendment protections will remain unchanged under the new criteria. Currently, they must calculate the risk that their humorous statements may be crossing the line between protected humor and defamation. Without clear standards, comedians can only guess where that line is drawn. Accordingly, they must resort to some degree of self-censorship. The only effect these proposed criteria will have will be to require that motions to dismiss be decided more objectively and predictably.

Critics may suggest that if more cases go to a jury, there will be more decisions against comedians, thereby increasing self-censorship. However, comedians will benefit from the suggested criteria. They will know in advance with greater certainty the type of conduct that will render them liable in a defamation action, thus allowing them to avoid such actions.

VII. VIEWING *CARSON* AGAINST THE PROPOSED CRITERIA

Applying the proposed criteria to *Carson*, Mendelson's case would have gone to a jury. Looking to the context standard, it is reasonable to assume that most people have heard of the Tonight Show and know Johnny Carson as an entertainer. However, the monologue portion of the show consists of Carson's commentary on factual items, current events and news, during which both humorous and non-humorous remarks are intermingled. A viewer seeing the monologue portion for the first time would have little, if any, way of knowing whether the show was predominately humorous.

Next, as the *Carson* court found, the dentistry skit was certainly "of and concerning" Mendelson. His name appeared on a marquis behind Carson throughout the entire sequence, and he was referred to by name at least ten different times. Mendelson was clearly recognizable. Third, many of Carson's statements were true. A root canal is a commonly feared procedure. It is also true that patients do recline in dental chairs, listen to high speed drills, smell burning tooth enamel, and see clouds of smoke come from their mouths. Dentists pick food from people's molars, and from time-to-time have been known to have bad breath. Although thinly veiled with humor and interspersed with exaggerations and clever analogies, Carson's remarks were truths commonly known by anyone who has been a dental patient.

Finally, under the fourth criterion, it is entirely possible that a viewer would construe the dentistry skit as offensive to Mendelson. From Carson's introduction to the segment itself, it is apparent that a dentist sent a letter objecting to one of Carson's previous remarks and asked only for a "smirk-free public apology." Mendelson, however, received significantly more. He became the target of a Carson monologue on national television. By name, he was held up to the viewing public for mockery and ridicule for having dared to voice his displeasure at Carson. Becoming an undeserving and unrequested object for the amusement of others seems too high a price for Mendelson to pay in exchange for Carson's first amendment protection.

Accordingly, in light of the proposed criteria, Carson's motion to dismiss should have been denied, and Mendelson's case sent to the jury. While Mendelson may ultimately have fared no better, he would at least have received his day in court.

VIII. SUMMARY AND CONCLUSION

The law of defamation requires a delicate and thoughtful balancing between the important interests of first amendment rights of free speech and the rights of individuals to protect their reputations. While humor in its many forms is needed and welcome in our society, defamation in humor involving private figure plaintiffs presents substantial problems which threaten to disrupt the balance. Judges unnecessarily compromise plaintiffs' reputation interests in deference to defendants' first amendment rights. The current judicial method of determining which claims are actionable must be reformed in order to obtain objective, consistent and equitable decisions.

Cary Dee Glasberg

