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Libel

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Defamatory statements are those which harm an individual's reputation in the eyes of the community. The law distinguishes between *slander* (spoken defamation) and *libel* (written or broadcast defamation). Libel law attempts to balance the interests of journalists and others with the rights of individuals and organizations to protect themselves against false and injurious attacks. American libel law has changed significantly since the 1960s, offering greater freedom to journalists to criticize public figures. At the same time, libel law has also become more complex, creating ongoing uncertainty about when journalists are on safe ground. Libel lawsuits are still the most common legal complaints filed against the news media. Defense against these can be time-consuming and costly; suits occasionally result in large monetary damage awards, and can be abused by the powerful to divert attention from their own wrongdoing and muzzle their critics. Despite these problems, attempts to reform libel law have rarely succeeded, in part because of opposition from news organizations.

Development

Greek myths, the Bible, Shakespeare's plays, and other classic texts are filled with stories of individuals seeking to avenge their honor by violent means. The law of defamation arose in part to help individuals more calmly resolve conflicts provoked by insult to one's reputation. American libel law emerged from English Common Law, a set of customs that developed over centuries. Seditious libel concerns criticism of government or its officials.

Common Law prohibited strong criticism of government and the laws. This type of libel law has been slowly weakened, but not entirely discarded. In 16th century England, the written word was thought to pose a greater threat than speech because pamphlets and newspapers could reach farther and endure longer than conversation. Therefore, English printers had to obtain licenses

from the government and faced prosecution for criticism of that government. The United States inherited this tradition. Although the First Amendment to the U.S. Constitution, adopted in 1791, states that “Congress shall make no law abridging freedom of speech or of the press,” the extent of journalists’ right to criticize the government remained unclear. Just seven years later, amidst partisan rivalries between President John Adams’ Federalist Party and Thomas Jefferson’s Republican Party, the Federalist-dominated Congress passed a Sedition Act, which banned false and malicious statements against the state as well as calls to resist the laws. The Act aimed in part to silence newspapers associated with Jefferson’s party, which had criticized Adams and the Federalists. The law expired three years later and Jefferson, then President, pardoned those who were convicted under it.

However, laws against seditious libel have been revived several times. In 1918 (during World War I) and 1940 (before American entry into World War II), Congress passed laws that limited criticism of government. Not until 1969, in *Brandenburg v. Ohio*, did the Supreme Court significantly restrict prosecutions for seditious libel to statements that aim to spark immediate violence against the government. The court noted that advocating the use of force against the state or breaking its laws could not be punished, “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such actions.” Yet some critics of the USA Patriot Act – an anti-terrorism law passed after the attacks of September 11, 2001 – saw a weakening of these free speech protections in the Act’s ban on any “attempt to intimidate or coerce a civilian population” or alter “the policy of the government by intimidation or coercion.” Given the history of increased restrictions on speech during wartime, it is unlikely that prosecutions for seditious libel will entirely disappear in the future.

Libel is mainly a matter of civil law, in which private individuals or organizations sue for damage to their reputations, rather than criminal law, in which government prosecutes attacks on public order and wellbeing. Libel is also an example of tort law, which governs offenses against persons or property that do not involve contracts. For most American history, states almost entirely controlled defamation law. Important differences among state laws remain, but the Supreme Court has stepped in to standardize important elements of libel law across the country beginning with its groundbreaking decision in 1964 in *New York Times v. Sullivan*. In it, the

Court determined that state laws must balance the interests in protecting individual reputations with the U.S. Constitution's free speech protections for public (or media) discussion. More particularly, media have a right to criticize how public officials conduct their official functions. As a result of this and later decisions, it has become very difficult for a public figure to successfully bring a libel case as they must prove that the media acted with "actual malice" in making derogatory remarks.. This has created greater protections for the press reporting about individuals in public (government, business, entertainment) life.

Product disparagement, or trade libel, has become more important to news media. Trade libel involves comments questioning the reputation of a product rather than the individual or organization responsible for producing or selling it. In the 1990s, many states passed laws to enable banks, insurers, and food producers to defend against attacks on the quality of their products or services. Many of these laws were inspired by a 1989 story by the CBS news magazine *60 Minutes* that suggested Washington state apples were unsafe because they were treated with a chemical suspected of increasing the risk of cancer. Apple sales plunged briefly after the story aired, prompting farmers to sue CBS for \$100 million in lost revenues. Similarly, in 1998 Texas cattle ranchers sued talk show host Oprah Winfrey (1954–) when beef sales declined after she aired a segment in which a guest alleged that many U.S. cows were infected with mad cow disease and Winfrey responded that she planned to stop eating hamburgers. Neither the apple growers nor the beef ranchers succeeded in court because they could not prove the statements about their products were false. Product disparagement remains an area of unsettled law. Yet the high costs of these trials and potential for plaintiffs to win enormous damages have made some news organizations more cautious about criticizing the quality and safety of products.

Elements of Libel

To bring a successful libel lawsuit against a news organization, four elements must be proved by the plaintiff (one who files a suit against a defendant).

Publication: To prove that a libelous statement has been published, plaintiffs must show that at least one person besides the speaker and the plaintiff received the communication. This is fairly

straightforward in cases involving news media, where it is presumed that anything in a newspaper, broadcast, or posted to the Internet has been seen by others. Both news stories and editorials can be sources of libel. In some circumstances, news organizations can be held responsible for republishing defamatory comments. Journalists are not protected simply by attributing a libelous statement to a source – if the reporter decides to include it, he or she can be held to account. News organizations can also be held liable for material supplied by an outside speaker, such as an opinion piece, letter to the editor, advertisement, blog posting, or comments made on television or radio. Even internal communications, such as company newsletters, can trigger a lawsuit.

With some exceptions, almost anyone who is involved in publishing an alleged libel may be sued, including reporters, editors, and the news organization itself. However, vendors who merely distribute copies – such as newsstands, bookstores, and libraries – are not responsible unless it can be shown that they had reason to know that they were disseminating libelous material. Similarly, Internet Service Providers (ISPs), such as America Online, are considered vendors of material that others post to their systems (emails, chat room comments, news articles, and the like), and are thus not responsible for transmitting defamation unless they do so knowingly. Because the Internet reaches beyond national borders, however, it is unclear whether U.S.-based ISPs can be sued for defamation in other countries where laws do not protect online providers as fully as in the United States.

Indeed, the increasing reach of mass media means that publication can occur across a wide range of legal jurisdictions. A plaintiff may sue in any state in which the potential libel was circulated, even if the plaintiff does not live there. Publication of stories on the Internet has subjected U.S.-based news organizations to suits in other countries where plaintiffs lived or had personal or business associates. Significant differences in libel law among states and countries allows some plaintiffs to “shop for venues,” filing a suit in a jurisdiction where law is most favorable to complainants.

Identification: Plaintiffs must also show that a libelous statement is indeed about the plaintiff. To win damages, plaintiffs need to demonstrate that a significant number of people recognize the

defamatory statement as being about the plaintiff. Although the exact number of people who can identify the plaintiff from the remarks at issue is unclear, it must be more than one or two persons to show that one's reputation has been damaged in the community.

Identification does not occur only when a plaintiff is named directly in a news story.

Defamatory material about a person with a similar name as the plaintiff's that creates the impression that a story is about the plaintiff may count. So might an image of the plaintiff, even if it is not accompanied by a caption naming him or her. Describing a person by their job title, such as "the city dog-catcher," is often enough. Even providing enough clues to a person's identity to allow a large number of the person's associates to identify him or her may be sufficient. For example, a story that falsely alleged that police were seeking a rape suspect described as a "middle-aged white male driving a white Dodge van with a 'Question Authority' sticker on the rear bumper" could constitute identification if the article led a man's family, neighbors, and friends to see him as the suspect. The courts have found that members of small groups may sue when the group is defamed even if its individual members are not named. Thus, if a journalist falsely claimed that "the city council has been taking bribes," each member of the council may be able to bring a libel complaint.

Defamation: Libel plaintiffs must also demonstrate that the material at issue disparages their reputations. Some statements, called libel *per se*, are clearly defamatory on their face, such as claims that a person is a "drunkard" or a "liar." Other claims, called libel *per quod*, are only damaging if the reader can connect them with additional information in a way that harms reputation. For example, mistakenly reporting that a famous athlete was seen on "a date" with a movie star can be considered libelous if it is widely known that the athlete is married to someone else. Courts assess whether the statements at hand would diminish the complainant's reputation in the eyes of reasonable people in their community. Changes in social values and the meaning of words are taken into account in determining whether material is defamatory. Thus, a claim that a woman wore a "short skirt, red lipstick, and a tight shirt with the words 'Hot Stuff' on the chest," which might have been considered an attack on her sexual modesty a century ago, might not be considered defamatory by today's fashion standards.

The kinds of statements that most commonly provoke libel suits involve accusations about criminal activity, sexual behavior or victimization, honesty, financial condition, health (including drug or alcohol addiction), business dealings, and professional competence.

Falsity: Libel plaintiffs who are public figures must prove that a statement about them is false, while private figures do not have to prove falsity unless the claim is about a matter of public concern. Public figures include those who have willingly thrust themselves into the public arena, such as elected officials, celebrities, leaders of campaigns to affect public policy or behavior, and highly visible leaders of major institutions (businesses, religious organizations, and so on). Because public figures may enjoy power, fame and more access to the media to respond to allegations, they must meet higher standards of proof in libel suits. Private figures need only prove that a statement about them is false when it touches on an issue important to the public, although the courts have not defined such matters clearly. In cases involving reports on private matters of a private plaintiff, the defendant bears the burden of proving that the claim is true.

Not every word of the disputed report must be shown to be true or false, only the gist of the report that concerns potentially defamatory material. However, a story that contains no false claims still may be libelous if it creates a false view of the plaintiff by omitting key facts. For example, a story that stated that a wife “attacked her husband with a hammer and he died six weeks later in the hospital,” may be libelous if the husband in fact died of a heart attack not related to his encounter with his wife because the report falsely suggests that the wife was responsible for her husband’s death.

Fault: All plaintiffs must prove that the defendant was at fault in publishing a libel, although the standards for doing so differ dramatically depending on who sues. Private figures must prove that the defendant was negligent, failing to exercise reasonable care. Public figures must meet a higher standard, showing that defendants acted with “actual malice,” which means either publishing a statement despite knowing that it was false or exhibiting reckless disregard for the truth.

Negligence arises from how a reporter prepares a story. The overarching question is whether a journalist made a reasonable and competent effort to establish the truth or falsity of the report. Common causes of negligence include relying on untrustworthy sources, failing to consult obviously relevant sources (such as the subject of the disparaging story), ignoring or grossly misinterpreting evidence that would challenge the libelous statement, and careless editing (dramatic alteration of the meaning of quotes from sources, misattribution of quotes, misidentifying the subjects of photos, and so on).

Actual malice may be proved in either of two ways. Plaintiffs may demonstrate that journalists knew a claim was false but published it anyway. However, the Supreme Court has ruled that altering a source's quotes does not necessarily count, "unless the alteration results in a material change in the meaning conveyed by the statement." Plaintiffs may also show that journalists showed reckless disregard for the truth. The Supreme Court has ruled that proving such disregard involves establishing that journalists had "a high degree of awareness of probable falsity" of a claim (*New York Times v. Sullivan*), or that "the defendant in fact entertained serious doubts as to the truth of his publication" (*St. Amant v. Thompson*). Courts sometimes use a three-part test devised by Supreme Court Justice John Harlan in his opinion on two 1967 cases (*Curtis Publishing Company v. Butts* and *Associated Press v. Walker*) to help assess whether reporters act with reckless disregard. The test involves asking 1) whether publication of the story was urgent or if there was sufficient time to check the facts fully; 2) how reliable was the source of the story and the journalist who produced it; 3) whether the story was probable or highly unlikely. Breaking news that relies on trusted sources reported by professional journalists that involve credible events are likely to escape findings of actual malice. Because journalists rarely admit to negligence or disregard for truth, it is difficult for plaintiffs to prove, requiring extensive examination of how a story was produced and the reporter's state of mind at the time

Defenses

News organizations may rely on one of several defenses to seek dismissal of a libel claim.

Statute of Limitations: All states have limits on how long a plaintiff can wait to bring a libel suit. Depending on the state, a suit must be filed within 1 to 3 years of publication of the alleged

defamation. However, each time a radio or television station rebroadcasts a program it is considered a fresh publication.

Truth: Defendants in cases involving private plaintiffs on matters of private interest may dismiss a libel claim by proving the truth of their statements, using similar criteria for assessing falsity discussed above. In cases regarding matters of public concern or public figures, defendants need not prove truth, but may do so in response to plaintiffs' cases.

Privilege: To protect the conditions for free and open debate in a democracy, certain kinds of communication are protected from liability for defamation, or "privileged." The comments of participants in legislative forums, judicial forums, and the administrative and executive branches of government enjoy an absolute privilege against libel claims. This immunity from libel extends to remarks by lawmakers, witnesses at public hearings and in court, reports issued by government agencies, and other communications made in a government forum (although officials' comments outside these forums can form the basis for a libel claim).

In recognition of the news media's valuable role in disseminating news of governmental affairs, journalists have a qualified privilege when they report a fair (balanced) and accurate summary of what was said in a privileged (official) proceeding or document, even if the comments reported include libel.

Opinion: Expressions of opinion rather than fact are generally not considered defamatory. Opinion has long been a staple of journalism that contributes to public discourse about everything from politics to art to food. Another reason for exempting opinion from libel is that opinion cannot be proved false or true. If a television talk show host calls a guest "an ugly fool" there is no cause for libel because one cannot prove or disprove objectively that someone is ugly or a fool – both qualities are in the eye of the beholder. However, the host cannot claim an opinion defense if he says the guest is "an ugly fool whose wife left you because she couldn't stand the sight of you," and the guest can show that his wife did not leave him because of his looks. In this case, there may be cause for libel because the question of whether and why the wife ended the marriage is factual.

When distinguishing fact from opinion, many courts go beyond considering whether a statement can be disproved to consider other factors outlined by the U.S. Court of Appeals for the District of Columbia Circuit in *Ollman v. Evans* (1984). The *Ollman* test also includes asking about the common, ordinary meaning of the words used. Some apparent statements of fact are often used to express opinion, as when a person is accused of being “an animal,” and thus should not be cause for libel. The test also inquires into the journalistic context of the statement. Claims made in places where audiences have come to expect opinion, such as the editorial page of a newspaper or a comedy program that satirizes the news, are more likely to be viewed as opinion. Finally, the test considers the social context. Coverage of remarks made in protest rallies, for example, are more likely to appear as opinion than those made at a medical conference about the findings of a recent study on the safety of a particular drug.

Similarly, hyperbole (exaggerated statements about someone or something) is also not considered libelous because reasonable people could not take such claims to be literally true. Overstatements, epithets, and satire often fall into this category. For example, a court found that television journalist Geraldo Rivera (1943–) used hyperbole and so was not liable for defaming a man by calling him an accomplice to murder for creating a web site that revealed the personal contact information of doctors who performed abortions – information that could be used by pro-life extremists to find and kill physicians.

Other Defenses: Several other defenses have been passed down from Common Law and are therefore not recognized by all courts and less likely to be used today. The Fair Comment defense protects opinions about a matter of public interest that are based on true facts. The Consent defense absolves those who can show that the plaintiff acquiesced to publication of the statement beforehand. The Right of Reply defense, or “self-defense,” protects a speaker’s libelous remark made in response to an initial libel against her or him as long as the response is not more severe than the claim that provoked it.

Damages

News organizations must pay close attention to the four kinds of damages a successful plaintiff may win in a libel case because the scope of damages can threaten the organization's survival. *Actual damages* compensate victims for harms suffered as a result of the libel such as mental suffering or diminished standing in the community, which are difficult to estimate in financial terms. *Special damages* are specific monetary losses that can be precisely documented, such as wages lost by someone who is fired because of the libel. *Presumed damages* (also called general or compensatory damages) may be awarded without requiring proof of harm. *Punitive damages* are designed to punish the defendant and deter others from similar wrongdoing. Juries can sometimes make large awards of actual and punitive damages. Complaints about excessive punitive damages awarded in some cases have convinced several states to ban them and others to consider capping them.

Libel Reform

Dissatisfaction with libel law is widespread for several reasons. First, determining libel has grown increasingly complex in the post-*Sullivan* era. Judges and jurors struggle to interpret and apply concepts such as actual malice, public versus private figures, fact versus opinion, and the array of damages that can be awarded. Mistakes by judges and juries must be re-heard and corrected through appeals to higher courts.

Second, this complexity means that cases can be protracted and expensive for all involved. One cannot mount a major libel suit or defend against one without paying expert lawyers hundreds of thousands or even millions of dollars to prepare and argue these complicated cases. *Sullivan* was supposed to give journalists more room to foster criticism of public officials by requiring public figures to surmount the obstacle of proving actual malice in court. But establishing knowing or reckless disregard for truth requires extensive attention to journalists' state of mind and work process as they prepared their stories. From the plaintiff's standpoint, these costs mean that individuals and organizations with few resources are unlikely to be able to vindicate their reputations in court. Even powerful plaintiffs rarely succeed in restoring their reputations in a timely manner (the average libel suit lasts four years). From the media's point of view, important news may be squelched if media defendants fear that reporting it will spark a lawsuit

from a well-heeled individual or corporation. The increasing costs to the media of defending against libel suits, of damage awards, and of libel insurance, raise concerns about chilling critical coverage of the powerful. Although media defendants succeed in getting most libel cases dismissed before they go to trial, juries are more likely than not to find the media guilty in cases that do proceed to trial, which can result in millions in damages. Small media organizations can be especially vulnerable to bankruptcy if they lose. They may avoid risky features such as police blotters, letters to the editor, or investigative reporting rather than face a crippling libel suit.

Third, libel lawsuits are sometimes abused by powerful plaintiffs who aim to silence critics. Strategic Lawsuits Against Public Participation (SLAPPs) refer to suits that have little legal merit but are brought to intimidate citizen groups to stop speaking out to government and the media against real estate developers, polluters, and others. Sometimes these suits aim at the media themselves. Even if plaintiffs rarely win these cases, and at least twenty states have passed laws against them, these costly suits can muzzle legitimate contributions to public debate.

In response to these problems, several proposals have been made to reform libel law. One reform would allow the news media to publish a retraction, acknowledging inaccuracy in a story and apologizing for it, in exchange for removing the threat of damages at trial. A majority of states have adopted laws to this effect. Although retraction laws differ, and some have been ruled unconstitutional by the courts, they typically share several features. The potential plaintiff must request a retraction from the publisher before a libel case can be filed. If the news organization complies by publishing the retraction as prominently as the libelous statement was featured, the plaintiff can only seek limited damages, or none at all, in court. Such laws aim to give the media an incentive to admit inaccuracy or negligence when they are wrong by removing the fear that the admission could be used against them later in court. Plaintiffs may be more likely to avoid going to court because they can clear their names more quickly and cheaply. Practice in many European countries suggests another model in which those who have been attacked have a right to reply in the journalism outlet that criticized them. Others have suggested moving libel out of the courts by referring cases to trained arbitrators who would focus primarily on questions of truth and falsity, such as news councils made up of journalists and citizens. But these small-scale arbitration programs have not been widespread. Some news organizations have

begun to counter-sue libel plaintiffs for malicious prosecution or abuse of process, but the courts have not been receptive to these suits for fear of deterring legitimate libel plaintiffs.

Although many agree that some libel reform is desirable, it has not been very successful. Many news organizations oppose offering frequent retractions, either because they believe their stories are correct or fear losing credibility. Libel lawyers have a financial stake in continuing the present system, which brings them business defending or suing the media. And no other organized constituency has stepped forward to demand change.

Conclusion

The law of defamation arose to protect public order and individual honor. Prosecutions for seditious libel – attacks on the government – are rare, but still pose a danger to vociferous critics of the state in wartime. Today, libel is mainly a civil tort used by individuals and organizations to defend themselves from assault, especially in the news media. Since 1964, the courts have recognized that protecting reputations must be weighed alongside the often conflicting interest in robust and freewheeling debate on public issues. The law has expanded journalists' freedom to publish negative information, especially about public figures. However, this freedom has come at a price. Libel lawsuits have become enormously complex, costly, and time-consuming. They can be used as weapons to deter the media from publishing valid critique of powerful people and institutions. Few small plaintiffs can command the resources needed to bring a successful lawsuit against a large media organization. Courts do not often render verdicts on the truth of an alleged libel in a timely manner, leaving the public in the dark. Yet attempts to simplify libel law in order to serve the interests of news organizations, plaintiffs, and the public have foundered because of resistance from those most involved in libel suits.

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See also: Censorship/Prior Restraint; First Amendment; Free Expression, History of; Investigative; Muckrakers; News Councils; Press Councils; Sensationalism/Yellow Journalism; Supreme Court