

Editors Only.

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Libel Law 101: A Primer for Editors

Understand the elements to a libel claim or run the risk of an adverse libel verdict!

By Lawrence Savell

Although editors need to keep in mind a wide range of legal concerns, probably the most critical is libel/defamation. The dollar amounts

of some adverse libel verdicts have been staggering, and an increased sensitivity to potential liability in this area can pay big dividends down the road.

Elements

There are four elements to a traditional libel claim: (1) defamation; (2) publication; (3) "fault"; and (4) harm/injury.

Defamation:

A defamatory statement is a false and negative statement about another. Although the precise definition differs in different jurisdictions, the focus is on an injury to reputation, a communication which exposes a person to hatred, ridicule, or contempt, lowers him or her in the esteem of others, or causes the person to be shunned or injured in his or her business or

(Please turn the page)

What's In This Issue ...

Libel 101: A Primer for Editors	1
Designing Regional Magazines	1
Part 1 The Process of Writing	4
Make Your Pages Visually Inviting to Readers	6

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(from page 1)

calling. However, merely unpleasant or offensive statements are generally not defamatory. In addition, words that, while having a negative connotation, are simply too vague or incapable of being proven false — may not be actionable. According to recent cases, these could be descriptions of someone as a “rat,” “crank,” “scab,” “traitor,” “scam,” “fake,” or “phony,” “dealing with half a deck,” or being “amoral” or a “lazy, stupid, crap-shooting, chicken-stealing idiot.”

In determining whether a statement is defamatory, words are to be given their common and ordinary meaning, and natural implications from those words may be considered. A statement is judged not in isolation, but within the context in which it is made.

There are some traditional classifications of libelous words, such as those:

- impugning one's *esteem or social standing* (such as a false charge of crime or immorality)
- exposing one to *ridicule*, making a person look uncommonly foolish (although it must be more than a simple joke at another's expense; mere satire and exaggeration are not enough)
- imputing *disease or mental illness* at the present time (if it reflects immorality, it may be libelous even if the statement reports the person is cured)
- indicating *incompetence* in one's trade, occupation, office, or profession (although mistakenly attributing a single instance of

error to a professional may not be enough; questioning general professional competency may be required)

—questioning a corporation's *integrity, credit, or ability to carry on business* (including charges of dishonest or unethical behavior).

A key issue in determining whether a statement was defamatory to the plaintiff is *identification* — the requirement that the statement referred to the plaintiff or was “of and concerning” him or her. Identification need not be by name; the plaintiff can be pointed to by description or circumstances tending to identify him or her. It is thus prudent to verify all identifications and addresses, and make sure that fictitious identities do not accidentally identify a real person.

One frequent issue relates to when the plaintiff is a member of a

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group. The general rule is that identification cannot be established by a person who happens to belong to a heterogeneous group that is defamed. However, an attack on a small sub-group can result in liability, even if the individual's name is not used.

A defamatory statement must also be false. The plaintiff bears the burden of proving falsity.

Generally speaking, any living person or extant corporation can be defamed (unless he, she, or it is already so criminally notorious as to be “libel-proof” — which is rare). A dead person generally cannot be defamed.

When reviewing articles for potential libel concerns, the scope of review should be broad, and include careful examination of:

—*the story* (and all side bars and related pieces; note that quotations wrongly attributed to the plaintiff may be found to be defamatory)

—*headlines* (which are key because of their prominence — some readers may read only this and not the explanatory body)

—*photographs, graphics, and illustrations* (they must accurately convey the thrust of the story; be wary of stock photographs used to illustrate a sensitive subject)

—*any promotional/“hype” material.*

Publication:

The second element is that the statement be published, *i.e.*, that there be circulation of it to at least one other person than the person defamed. Multiple publications of a libel may increase liability. However, most states follow the “single publication rule,” which provides that the entire edition carrying an alleged libel constitutes only one publication.

“Fault”:

The third, and often most confusing element of libel is “fault,” the degree of responsibility of the person or entity making the statement that rises at least to the level of negligence. From the landmark 1964 Supreme Court case of *New York Times v. Sullivan* and its progeny, the rule has evolved that public officials and public figures (because of the public's interest in news stories that concern them) have to prove the high standard of “actual malice.” This basically means the statement was published (1) with knowledge of its falsity, or (2) with reckless disregard of whether it was false or not. (The term was an unfortunate choice of words by the Court, as it misleadingly

suggests to many that a finding of "ill will" is required.) The bottom line is that private persons have an easier standard, as they only have to prove that the defamation was published negligently or without the due care that an average person of ordinary sensibilities would have used. The battle in libel cases thus often concerns the status of the plaintiff, and whether he or she truly is a public official or a public figure. In certain circumstances, one may be a public figure only with regard to a specific matter or occurrence. Even a corporation may sometimes be a public figure.

Assessment of "actual malice" involves an examination of the facts involved in a particular case. For example, reliance upon a single potentially-questionable source may not necessarily constitute "actual malice" where the writer did not possess subjective doubt about the accuracy of the information. One danger is where the sole source is a confidential one: some courts have ruled that a publisher will be precluded from relying on such a source at trial to prove lack of "actual malice" if it chooses to keep the source confidential.

Harm/Injury:

The final usual requirement is that the plaintiff demonstrate some out-of-pocket money loss or impairment of reputation and standing in the community, personal humiliation, or mental anguish and suffering.

Privileges/Defenses

The most common defense to a libel claim is truth — that the statement made was accurate, or, in many jurisdictions, while perhaps not literally true in every detail, at least "substantially true."

There are also a number of "privileges," which allow the making of what might otherwise be libelous statements. One of the most important is the "fair reports privilege," which protects fair and accurate reports of judicial, legislative or executive proceedings and records. To fall under that privilege, the official source must be identified and the report must be fair and accurate. It should reflect the entire record or proceeding; thus, denials of a court complaint should be reported.

A currently "hot" area in libel law is the extent to which statements of "opinion" are insulated from libel liability. The traditional view used to be that abusive words arising in agitated, heated controversies were generally treated as statements of opinion or rhetorical hyperbole (exaggeration) and as such were not considered libelous. That approach has been modified, such that liability may be found if the statements in question *imply a libelous factual assertion*. Thus, depending on the circumstances, even a statement expressly designated as an "opinion" may be the subject of claim. (Somewhat similarly, cases have also suggested that the *posing of a question*, if it implies suspicion of wrongdoing or other "bad acts," may potentially be defamatory.)

Given the huge potential liability in libel cases (multi-million dollar judgments are not unheard of), it pays to carefully review articles with an eye to such claims. Such review should include the following inquiries with regard to the reporter or writer involved:

- prior *problems* or potential *bias*?
- failure to *contact persons* known to have relevant information?

—failure to *review documents* that would contain relevant information?

—excessive reliance on *biased* or *inherently incredible sources*?

—exclusive reliance on *confidential sources*?

Some relief from the risk of huge adverse verdicts may come from the proposed Uniform Correction or Clarification of Defamation Act, which is in the process of being considered by various states. This is an attempt to expand beyond traditional retraction statutes, which more than half of the states have in some form, and which provide incentives to issuing retractions or clarifications. The Act requires a prospective plaintiff to (1) request that the publisher print a correction or clarification before bringing a defamation suit, and (2) upon demand, provide the publisher with evidence in the prospective plaintiff's possession that relates to the falsity of the alleged defamation. If the publisher makes a sufficient correction or clarification (or if the demanded material regarding falsity is not provided), the plaintiff can recover "only provable economic loss caused by the defamatory publication, as mitigated by the correction or clarification" — thus, no punitive damages (often the lion's share of a huge adverse verdict). Editors and publishers desirous of the positive attributes of the Act should encourage their legislators to propose and adopt it in their respective jurisdictions.

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