Libel: Why Attribution Matters

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What is Libel?

- It’s a false (as in erroneous or inaccurate or maybe misleading) statement about a person – or a company – that harms the subject’s reputation.
  - Reputation: Hold that thought for a moment
- The plaintiff doesn’t even have to be named in the article, if it’s reasonably clear whom the report referred to
What is Libel?

- Libel can crop up anywhere, print or online
  - A crime story about a confession
  - A restaurant review
  - A headline over a photo caption
  - Misplaced or muddy attribution
- Let’s define what we’re talking about
- Then we’ll look at some examples
What is Libel?

Most libel pertains to
- Criminal activity
- Character and honesty
- Professional competence
- Political, religious, racial matters

It’s what the legal system calls a tort — no different than a car crash that injures another person.
What Libel Looks Like

D - I - P - F

Plaintiff (named in story)

Identification by 3P

Third Party (sees or reads news report)

Defendant (newspaper, TV station)
For libel to occur, three parties are required:

1. The target of the libel
2. The libeler
3. Someone who thinks less of the target – reputation
What the Plaintiff Has to Prove

- Do – It – Pretty – Fast
  - Defamatory words
  - Identification:
    - The communication concerned the plaintiff
  - The statement was published
  - Fault:
    - Actual malice
    - Negligence
The Fourth Element: Fault

Fault

- Public person
  - Actual malice
- Private person
  - Negligence
If the plaintiff is a public official or public figure, the plaintiff will have to prove the defendant committed actual malice
  ◦ Harder to win case
If the plaintiff is a private figure, the plaintiff will have to prove the defendant was negligent
  ◦ Easier to win case
Fault

- **ACTUAL MALICE**
  - The defendant knew the story was false but printed it anyway. OR
  - The defendant published it and didn’t care whether it was true or false

- **NEGLIGENCE**
  - The defendant was careless while writing and editing the story for publication
Fault

- ACTUAL MALICE = MURDER
- NEGLIGENCE = MANSLAUGHTER
Fault

- Public Figure
- Private Figure

- Actual Malice
- Negligence

- Before *Sullivan*: If the statement is true, then no libel
- After *Sullivan*: The actual malice standard
  - We posted/printed the story & we knew it was false
  - We didn’t care whether it was true or false when we posted/printed it (kind of like aggravated negligence)

- A public official or person in the public eye has to show more than that a statement was false in order to win a libel case
- Actual malice
  - A misnomer, because the court wasn’t using the word malice like we do — spite or ill will

- Malice — hence libel — occurs against a public official or person in the public eye only if
  - The defendant (writer/editor) knew it was wrong when it was published
  - Or, the defendant (writer/editor) didn’t care whether it was wrong when it was published
The doctrine in this U.S. Supreme Court case applied only to public officials

Later, the justices applied this to people in the public eye, to all public figures

It does not apply to private citizens, who do not have to show malice if they have said/written something bad about another person
Actual malice is a wonderful concept for libel lawyers & publishers

Editors – freelancers or on the copy desk – should be aware of the basics

Doing so will help make sure that false statements don’t get into print
The best & oldest defense in a libel case, of course, is that the statement is true.
Truth prevails over damage to reputation:
- No matter how harmful the statement is.
Defense: Fair Comment/Opinion

- An opinion can’t be libelous
- The tricky part is that the courts don’t divide fact and opinion the way many journalists, writers or editors do
Defense: Fair Comment/Opinion

- A statement, in a restaurant review, that the food is barely edible, is opinion – no libel.
- A statement in that same column that the kitchen is riddled with roaches is libelous if the kitchen doesn’t have roaches.
  - That’s a statement of fact, even though it’s in an opinion column.
Accusing a former executive director of a housing authority of “nepotism” and “mismanagement”

Opinion

A talk show host’s comment that a county commissioner is a “sexual predator”

Opinion
Opinion?

- Calling an attorney a “criminal rogue lawyer who tried to solicit clients away from other law firms.”
- Not opinion

- Saying someone “stiffed a financial institution.”
- Opinion
Saying someone “pleaded poverty” in a bankruptcy proceeding.

Opinion
Opinions imply an assertion of objective fact

An opinion — to be protected — must be based on correct, even if unstated, facts
Keys to Understanding Opinion Defense

- An opinion may not be automatically verifiable with facts.
- Words such as “in my opinion” do not make a statement into an opinion if the statement is a fact.
“If a speaker says, ‘In my opinion, Jones is a liar,’ the speaker is implying a knowledge of some facts which lead to that conclusion.... “
“.... Even if the speaker states the facts upon which he based his opinion, if those facts are incorrect, incomplete or if his assessment of them is wrong, the statement may still be one of fact. Couching statements in terms of opinion does not make them non-facts.....”
Tips to Avoid a Libel Lawsuit Based on Opinion

- When stating an opinion, try to make sure it is understood as such
- BUT, the words “in my opinion” will not change a libelous statement into protected opinion
- Don’t relay on a journalistic context to protect you
- – Just because the libelous statement appears in a review, column or commentary does not mean a court will regard it as opinion
Tips to Avoid a Libel Lawsuit Based on Opinion

- Clearly state & summarize facts upon which your opinion is based
  - Ask yourself whether you believe a court could find that these facts support your opinion about the matter
- Make certain the facts are true
  - If the facts are in dispute, refer to both sides of the dispute when stating your opinion
Defense: Official Proceedings

- Another defense worth mentioning, available in most states, is that the libelous statement is within an accurate report of official proceedings
  - Also known as qualified privilege
Defense: Official Proceedings

Absolute Privilege

- Applies to the speaker

Qualified Privilege

- Applies to a writer or reporter repeating what the speaker said

The key: These are two different people!
Defense: Official Proceedings

**Absolute Privilege**
- Members of Congress
- Legislators
- City council members

**Qualified Privilege**
- Applies to a writer or reporter repeating what the speaker said

The key: These are two different people!
Defense: Official Proceedings

**Absolute Privilege**

- At a trial:
  - Judges
  - Lawyers
  - Witnesses

**Qualified Privilege**

- Applies to a writer or reporter repeating what the speaker said

The key: These are two different people!
Defense: Official Proceedings

Absolute Privilege

○ Government administrators
○ Police officers & arrest reports

Qualified Privilege

Applies to a writer or reporter repeating what the speaker said

The key: These are two different people!
Defense: Official Proceedings

- Qualified Privilege:
  - B may well choose to sue A, and not the newspaper, but might sue the newspaper as well
- In a high-profile trial, there’s no way not to print the statement made out of court
- But even then — and certainly in a low-profile trial — it’s worth running the statement past a libel lawyer
No protection is available based on a fair and accurate report of an official proceeding, a newspaper can be liable for reporting a libelous statement made by someone else.

In a high-profile story, reporting such statements may be unavoidable.

Again: Ask a lawyer.
Emerging issue: Liability for publication of outsiders’ comments on a Web page

The act appears to protect websites from libelous comments made by third parties

A plaintiff’s lawyer may argue some day that giving out this immunity is an unconstitutional taking of the plaintiff’s reputation

- The law may be void because it violates the Constitution