Recent trends in defamation law: From the straigtforward action in Ventura v. Kyle to unmasking an anonymous poster in the "Fuboy" case

Author: David P. Twomey

Published in *Business Law Review*, vol. 48, pp. 1-9, Spring 2015

RECENT TRENDS IN DEFAMATION LAW: FROM THE STRAIGTFORWARD ACTION IN *VENTURA V. KYLE* TO UNMASKING AN ANONYMOUS POSTER IN THE "*FUBOY*" CASE

by David P. Twomey*

I. INTRODUCTION

Internet and mobile platforms have radically changed how society consumes and shares news, opinions and other content. The Internet is now seen by some as the "Wild West" where anything goes and the preponderance of speech is either hyperbolic or acerbic, with speakers enabled to "sound off", often with harsh and unbridled invective.[1] A carry-over effect exists to cable television and satellite radio. The First Amendment protects freedom of speech and the long enduring right to speak anonymously in a lawful manner.[2] However, when vigorous criticism descends into defamation, constitutional protection is no longer available.[3] This paper presents, in a current context, a discussion of the elements and defenses in civil defamation cases. It then presents the special issues regarding online defamation cases including identifying anonymous posters of defamatory statements through nonjudicial and judicial actions. Further it identifies a framework for determining whether a statement is protected vigorous criticism or defamation, with true facts and pure opinions broadly protected and mixed opinions susceptible to its speaker being

* Professor of Business Law, Boston College, Carroll School of Management

[1] Bentley Reserve L.P. v. Papaliolios, 160 Cal. Rptr.3d 423, 431 (Cal. App. 2014).

[2] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).

[3] *Bentley* at 431.

unmasked in the pretrial defamation process. The paper concludes with brief admonishing for informed carefulness as we express our broadly protected First Amendment freedoms.

II. DEFAMATION ELEMENTS AND DEFENSES

Defamation is an injurious false statement by one party about another to a third party. Slander is spoken defamation. Libel is a false publication by writing, printing, picture or other fixed representation to the eye, which exposes any person to hatred, contempt or ridicule, or which has a tendency to injure the individual in his or her occupation.[4]

A. Elements of a Cause of Action in Defamation

The elements of defamation are (1) the making of defamatory statement, (2) publication of the defamatory material; and (3) damages that result from the statement.[5]

In cases in which the victim is a public figure, such as a well-known entertainer, a professional athlete or political figure, another element is required – the element of *malice*, which means that the statement was made by the defendant with knowledge that it was false, or with reckless disregard for whether it was true or false.[6] For example, former wrestler and Governor of Minnesota, and a former Navy SEAL Jesse Ventura sued Chris Kyle the author of the bestselling autobiography entitled *American Sniper* for defamation.[7] Kyle, also a former Navy SEAL, wrote that a character named "Scruff Face" holding court in a Coronado California bar said, "he hates America," the SEALS "were killing men and women and children and murdering" and SEALS "deserve to lose a few"; at which point Kyle "laid him out".[8] While not naming Ventura in the book, Kyle confirmed on the *O'Reilly Factor* cable network television show and the *Opie & Anthony* satellite

[4] *See* Wong v. Jing 117 Cal.Rptr. 3rd (Cal. App. 2010).

[5] Regarding damages, where one publishes a false statement of fact that imputes to another a communicable disease, or would adversely affect that person's fitness for the proper conduct of a lawful business, trade, or profession, the words are actionable in themselves, and the law implies compensatory damages. Once compensatory damages are established the jury will assess punitive damages to punish the party who committed the wrong and to deter others from committing similar wrongs in the future. See *Tanner v. Ebbole,* 2011 WL 4425540 (Ala. App. 2011) where the jury returned "nominal" compensatory damages of $1 and punitive damages of $100,000 against Paul Averette, the owner of a competing tattoo business, for statements to several patrons that his competitor Chassity Ebbole had hepatitis, syphilis, gonorrhea, and AIDS and that she used "nasty needles."

[6] *See New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

[7] *Ventura v. Kyle,* 2014 WL 6687499 at *1 (D. Minn. Nov, 26, 2014).

[8] *Id.*

talk radio program that "Scruff Face" was Ventura.[9] Kyle was later killed by a troubled veteran, and his wife, as executor of his estate, was substituted as defendant.[10] The case, brought by public figure Jesse Ventura, boiled down to a creditability contest with several witnesses testifying that Ventura's version of events was true, while several other witnesses testified that Kyle's version of events was true.[11] The jury decided the case for Ventura, with the court concluding that in believing Ventura's version of the facts, then Kyle's writing and telling of the story of punching out Ventura was itself a basis for the jury to make a finding of actual malice.[12] On the defamation claim, the jury awarded $500,000 in damages. Some $1,345,477 in damages was assessed for unjust enrichment for the money made in defaming Ventura in the book *American Sniper*.[13]

B. Defenses: Truth and Privilege

1. Truth

Truth is a complete defense to a defamation action and "true statements of fact however disparaging are not actionable.[14] The First Amendment also broadly protects pure opinion from defamation claims.[15] In *McKee v. Laurion* Dr. McKee brought a defamation action against the son of a patient who posted statements regarding Dr. McKee on various "rate-your-doctor" websites after his father's release from the hospital.[16] The court reviewed the statements in question and found that the statements were substantially true, pointing out that the common law approach to falsity in the context of libel "overlooks minor inaccuracies"[17] Regarding a final statement published as follows: "When I mentioned Dr. McKee's name to a friend who is a nurse, she said, 'Dr. McKee's is a real tool!!'"[18] The parties dispute whether this statement is protected opinion. The court stated that referring to someone as "a real tool" falls into the category of pure opinion because the term "real tool" cannot be reasonably interpreted

[9] *Id.* at *2.
[10] *Id.*
[11] *Id.* at *3.
[12] *Id.*
[13] *Id.* at *2.
[14] McKee v. Laurion, 825 N.W.2d 725, 730 (Minn. 2013). *See also* Miller v. Central Indiana Community Foundation, 11 N.E.3d 944 (Ind. App. 2014) where statements made by a community foundation president to a third party that an organization was being audited were true and thus not defamatory in nature.
[15] *Id.* at 733.
[16] *Id.* at 729.
[17] *Id.* at 730.
[18] *Id.* at 733.

as stating a fact and it cannot be proven true or false.[19] The court concluded that it is an opinion amounting to "mere vituperation and abuse" or "rhetorical hyperbole" that cannot be the basis for a defamation action.[20] Accordingly, truth is an absolute defense, and pure opinion cannot be basis for a defamation lawsuit.

2. Privilege

Some statements are privileged, and this privilege provides a defense to the tort of defamation. Absolute privilege applies to witnesses in court proceedings to encourage witnesses with information to come forward and testify. In *Mixter v. Farmer*, Attorney Farmer was so upset with Mixter's behavior during a trial that he sent letters to twenty other attorneys discussing Mixter's "unprofessional behavior" and seeking information from them about negative experiences with Mixter for a potential complaint to the Attorney Grievance Committee.[21] Mixter retaliated with a defamation lawsuit against Farmer.[22] An absolute privilege protected Farmer to make potentially defamatory statements; it serves the purpose of fostering the free and unfettered administration of justice.[23]

Where a witness granted immunity from prosecution testifies before a governmental agency, the witness is entitled to immunity from defamation lawsuits. Thus, when Roger Clemens sued his former trainer, Brian McNamee, for defamation, contending that McNamee falsely stated to a congressional committee that Clemens had used steroids during his professional baseball career, his defamation claim was dismissed because McNamee's statements were entitled to absolute immunity because that the proper administration of justice requires full disclosure from witnesses without fear of retaliatory lawsuits.[24]

III. ONLINE ISSUES: IDENTIFYING ANONYMOUS POSTERS

When false negative comments appear in social media, companies and individuals are faced with identifying anonymous posters of defamatory statements. Injured parties may pursue non-judicial means to identify the speaker of the alleged defamatory remarks, or seek judicial help to unmask the identity of the offending speakers.

[19] *Id.*

[20] *Id.*

[21] Mixter v. Farmer, 81 A.3d 631, 634 (Md. App. 2012).

[22] *Id.*

[23] *Id.*

[24] Clemens v. McNamee, 608 F. Supp. 2d 811 (S.D. Tex. 2009). On June 18, 2012, Clemens was acquitted of all six counts of lying to Congress.

A. Nonjudicial Identifications

In *Avepoint, Inc. v. Power Tools, Inc. d/b/a Acceler*, the plaintiff, Avepoint, based on the identification work of cyber investigators filed viable complaints against its competitor Axceler for posting multiple messages on Twitter referring to Avepoint as the "Red Dragon" which has long been associated with the People's Republic of China and Acceler's claiming that the plaintiff's products were made in China, that the made in China statements were false, and designed to hurt the plaintiff's sales to the U.S. Government which prefers to buy American software under the Buy American Act.[25]

In *Saunders v. Walsh*, Cheryl Saunders was successful in her defamation suit against Constance Walsh regarding anonymous defamatory postings on three websites stemming from an aborted sale of a wig at Walsh's Wiggin Out store.[26] Walsh admitted authorizing a posting on Ripoffreport.com in discovery. The plaintiff presented expert testimony tying the email address used in Yelp.com and MerchantCircle.com postings to Walsh and Wiggin Out.[27] Plaintiff Saunders was awarded $10,000 on her defamation claim and $4,000 in punitive damages.[28] The very nature of a posting on google.com two days after a wedding entitled "Disaster!!!!! Find a different wedding service" required no judicial intervention to identify the individual who posted the review.[29] The court determined that the operator of the wedding venue established a *prima facie* case of defamation against the reviewer.[30]

B. Judicial Action to Unmask Anonymous Speakers

Vigorous criticism of persons, employers, products and services by anonymous speakers may or may not descend to such a point that their remarks are no longer protected by the First Amendment and are actionable defamation. The illusion of anonymity can lead to speakers asserting ill-considered statements that may be actionable defamation. The reality is, however, that what is said online is capable of being traced back to the speaker. If the Internet service provider (ISP) of the speaker can be identified the ISP in turn can identify the speaker, using the email address given when registering to post and the webserver's record of the IP address and the time of each online action

[25] Avepoint Inc. v. Power Tools Inc. d/b/a Acceler, 981 F. Supp 2d 496 (W.D. Va. 2013).
[26] Saunders v. Walsh, 162 Cal.Rptr. 3d 188 (Cal. App 2013).
[27] *Id.* at 193.
[28] *Id.*
[29] Neumann v. Liles, 323 P.3d 521, 524 (Or. App. 2014).
[30] *Id.* at 529.

and may yield as well the computer used to access the message board.[31] Interactive websites themselves are immune from liability for content created by third party users, unless the website actively edits the content.[32] However, most ISPs will not voluntarily disclose a user's identity. Thus, it will often be necessary to obtain a court order to require the ISP to disclose the speaker's confidential identity information.

The First Amendment prohibits the government from abridging the freedom of speech and it also protects anonymous speech.[33] Courts must strike a balance between the right to anonymous speech and the right of those harmed by anonymous speech to seek legal redress. Before a plaintiff can compel disclosure of the identity of an anonymous Internet speaker the plaintiff must demonstrate to a court that he or she has a credible claim, and the anonymous speaker must be given an opportunity to defend himself before the court will order the unveiling of his or her identity.[34] Courts may apply an evolving *Dendrite test* to make its determination on whether to unmask a speaker's identity as follows:[35]

- Give notice to the anonymous speaker and allow a reasonable time to respond. [This step allows the defendant time to hire counsel, and appear anonymously in such a proceeding without revealing his or her identity.]
- Plaintiff must identify the exact statements made by the speaker.
- The plaintiff must set forth a *prima facie* cause of action to win a case, barring any defenses.
- The plaintiff must submit sufficient evidence for each element of its defamation claim. [The plaintiff is excused from presenting evidence that a plaintiff cannot be expected to show without the opportunity for discovery.]
- The court must balance the speaker's First Amendment right to anonymous free speech against the strength of the *prima facie* case

[31] *See* Paul Alan Levy *"Litigate Civil Subpoenas to Identify Anonymous Internet Speakers Litigation"*, LITIGATION, Vol. 37, No. 3, spring 2011 p. 2.

[32] Section 203(c)(1) of the Communication Decency Act of 1996.

[33] McInytre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995). "Anonymous is a shield from the tyranny of the majority." *Id.* at 357.

[34] Doe v. Coleman, 436 S.W.3d 207 (Ky. App. 2014).

[35] *See* The Reporters Committee for Freedom of the Press which took the *Dendrite test* set forth in the 2001 New Jersey appellate case *Dendrite International Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) as condensed by the Delaware Supreme Court in *Doe v. Cahil*, 884 A.2d 451,461 (Del. 2005) with clarifying explanations by the author in brackets in the following format. http://www.rcfp.org/browse-media-law-resources/digital-journalists-legal-guide/anonymous-speech-online-when-must-identify

presented and the necessity for the disclosure of the speaker's identity.[36]

C. Application of the Dendrite and Similar Tests

In *Doe v. Coleman*, the chairman of the Pike County Airport Board of Directors, William Hickman brought defamation actions against several anonymous users of the website Topix for posting allegedly defamatory statements about him.[37] The trial court denied the motions of John Doe 1 and John Doe 2 to quash subpoenas requiring the disclosure of their identities. The appeals court overturned the trial court stating Hickman had failed to demonstrate a prima facie case for defamation under standards essentially similar to the modified *Dendrite* test.[38]

In *Stone v. Paddock Publications Inc.*, the mother of a newspaper website commentator, Jed Stone, who is the mother's minor son, filed a petition seeking discovery of the identity of another commentator on the website with the user name "Hipcheck16" alleging he had made defamatory comments regarding her son.[39] The trial court ordered that the identity of Hipcheck16 be revealed.[40] The court of appeals reversed the trial court stating that encouraging those easily offended by online commenting to sue to find the names of their tormentors would have a chilling effect on society and is a noxious concept that offends our country's long history of protecting anonymous speech.[41]

In contrast to these cases the Lesters filed a lawsuit against anonymous posters on the Internet forum Topix who had accused the Lesters of being sexual deviants, molesters and drug dealers. Stating that a credible claim was established, the court ordered Topix to turn over identifying information including Internet Protocol (IP) addresses, which led to the identity of the posters, and ultimately a jury awarding $13.78 million in damages against the posters.[42]

D. True Facts, Pure Opinion and Mixed Opinions: Vigorous Criticism Versus Defamation

As stated in part II.B. of this paper truth is a complete defense to a defamation action. True statements of fact, however damaging, are not actionable. Pure opinions are opinions based on true disclosed facts and

[36] *Id.*

[37] Doe v. Coleman, 436 S.W.3d 207, 209 (Ky. App. 2014).

[38] *Id.* at 212.

[39] Stone v. Paddock Publications Inc., 961 N.E.2d 380,383 (Ill. App. 2011).

[40] *Id.* at 394.

[41] *Id.*

[42] Ki Mae Heussner, "*Anonymous Posters to Pay $13 Million in Suit*" http://abcnews.go.com/business/jury-awards-13-million-texas-defamation-suit-anonymous/print?id=16194071.

are broadly protected under the First Amendment. "Mixed opinion" statements can be actionable defamation however. A mixed opinion statement implies the existence of undisclosed facts and can be defamatory. In *Hadly v. Doe,* an anonymous defendant using the pseudonym "Fuboy" posted to a newspaper's message board a comment about Bill Hadly, a candidate for the Stephenson County Board that: "Hadly is a Sandusky waiting to be exposed. Check out the view he has of Empire [Grade School] from his front door."[43] A "Sandusky" is a figurative term for a child molester.[44] The court stated to whatever degree Fuboy's comment can be thought of as an opinion, it is a mixed opinion—it implies the existence of defamatory facts but does not disclose them.[45] The terms "waiting to be exposed implies the existence of undisclosed facts.[46] The appeals court affirmed the trial court's order that Comcast provide the identity and last known address of Doe aka "Fuboy".[47]

Legitimate customer complaints based on opinion are not actionable defamation. Futhermore, hyperbole, figurative language and rhetoric expression is protected opinion such as a posting "the worst wedding experience of my life," however, a factual assertion that "the bridal suite was a tool shed..." in context may be actionable in some courts.[48] Other courts are less willing to interpret comments as assertions of fact. In *Krinsky v. Doe 6,* a defendant using a concealing screen name on an Internet discussion forum, felt free to claim a corporate president was part of a management team of " 'boobs, losers, and crooks'" and " 'has fat thighs, a fake medical degree, ... and has poor... hygiene'".[49] The plaintiff served a subpoena on the forum's host seeking the defendant's identity and the defendant, appearing through counsel as "Doe 6," moved to quash.[50] The appellate court, viewing the defendant's post in the context of what was a particularly "[h]eated" discussion forum in which numerous other posts questioned defendant's creditability, and noting the defendant's "crude, ungrammatical" language, satirical tone, and vituperative, "juvenile name-calling," concluded the defendant's railing was nonactionable opinion and ordered the subpoena quashed.[51]

[43] Hadly v. Doe, 12 N.E.3d 75,79 (Ill. App. 2014).
[44] *Id.* at 91.
[45] *Id.*
[46] *Id.*
[47] *Id.* at 96.
[48] Neumann v. Liles, 261 Or. App. 567 (2014).
[49] Krinsky v. Doe, 72 Cal.Rptr.3d 231, 235 (2008).
[50] *Id.*
[51] *Id.* at 250, 252.

IV. CONCLUSION

We are sometimes disappointed by the services rendered or the performance of the products purchased and sold to us in our personal and business careers; and, in a tiff, the temptation exists to pummel perceived wrongdoers in anonymous online postings. The paper has established that truth is a complete defense to a defamation action and anonymous speech is constitutionally protected. Write or speak with appropriate vigor but with reasonable care. Be sure of your facts. Feel free to strongly express your pure opinions. Carefully avoid mixed opinions that may draw you into the hassle of contesting litigation to unveil your identity. Chances are writing online that the court will not be willing to find your writing to be a "mixed opinion" implying the existence of an undisclosed defamatory fact. Remember, however, that it is not true that "anything goes" online.