

When Reporting Harms Reputations: What are safe boundaries when you're reporting derogatory information?

PROJOURN



Denotes
KEY TIP

A famous quote about journalism is: “The job of the newspaper is to comfort the afflicted and afflict the comfortable.”¹

The business of journalism — exposing wrongs — means there is a chance that the subject of a story will sue if he or she feels they were presented in a false and negative way that harmed their reputation.

As a result, a journalist often wonders, “Can I be sued for defamation if I say or write that?” or “If I was sued, what are the chances I will lose?” The answer will depend on a variety of factors.

¹ From a commentary made by fictional Irish bartender Mr. Dooley, a character created by the Chicago Evening Post's Finley Peter Dunne in 1893.

WHAT IS DEFAMATION?

Defamation is a civil claim that allows individuals and companies to seek financial compensation for damage to their reputation.

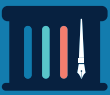
Because defamation law in the United States is based on laws and rules originally imported from England, and later shaped by U.S. Supreme Court decisions like *New York Times v. Sullivan* (1964) (which essentially “federalized” defamation law), this is a complex area of the law. However, the basics are fairly straightforward.



To be defamatory, a statement must:

- be a fact (not opinion),
- cause harm to the plaintiff's reputation (someone cannot sue over a statement made about someone else),
- be false,
- be published to third parties (there is no claim if the statement is made between the journalist and the subject) without a privilege,
- be the fault of the defendant (the subject can prove the journalist made the statement), and
- injure the plaintiff, such as by causing emotional harm.

In the United States, a plaintiff suing for defamation (either as a libel suit — for a defamation that is written, or as a slander action, for a spoken defamation) has the burden of proving all of these elements. If he or she cannot, the action will be dismissed.



DEFAMATION'S GRAY AREA

Generally speaking, opinions are subjective and cannot be defamatory, although such statements may deal with or refer to factual statements.



There are three types of opinion:

- a statement that cannot be proven true or false and does not make or imply a fact that can be proven false;
- rhetorical hyperbole that is written in such a way that a reader or viewer would not seriously believe that the journalist is making an actual fact about the plaintiff; and
- opinion based on disclosed facts where the journalist provides facts and the readers can evaluate the truthfulness of the opinions.

Determining whether a statement is fact or opinion can be complicated, especially when the statement concerns issues such as incompetence, ethics (or the lack of), immorality, or dishonesty.

A defamatory statement must be about or concerning a living plaintiff (generally, a dead person cannot be defamed). Not naming a person will not protect a journalist: It is enough that people can identify the person from the statement. While corporations, associations and other large groups can sue, they cannot sue on behalf of an individual executive or member (and vice versa).

To be defamatory, a plaintiff's reputation must be harmed.

False statements that someone committed a crime, engaged in professional wrongdoing, or committed sexual misconduct are clear examples of statements that can harm a person's reputation. **But, evolving social mores can alter what is or is not harmful.**

Consider societal views toward adultery, sexual preference, diseases, and even being born out of wedlock. As recently as the mid-20th century, an accusation of being a bastard carried a stigmatizing tag. **Does such an accusation carry the same negative impact today?**



PROVING DEFAMATION

If the subject of a false statement is a private person, legal liability for defamation can occur based on mere negligence by the journalist.

The legal standard for plaintiffs who are public figures such as elected officials is the higher standard of “actual malice.”

This requires a showing that the journalist either knew the statement was false or showed a reckless disregard for whether the statement is true or false. Actual malice must be shown by clear and convincing evidence.



Examples of conduct that can show malice include:

- having personal ill will or hostility;
- being opposed ideologically;
- failing to investigate properly or thoroughly;
- failing to give the person a chance to comment;
- ignoring previous conflicting reporting; or
- relying on questionable sources.

Truth is a complete defense (but not the only defense, remember a plaintiff must prove all of the elements listed above), whether the subject of an allegedly defamatory statement is a public figure or private person. It is always best if every detail of a statement is true.

But courts have recognized the “substantial truth” doctrine, which says that minor inaccuracies will be ignored so long as the inaccuracies do not materially alter the substance of the statement. Therefore, only the “gist” or “sting” of the allegedly defamatory statement has to be accurate to keep journalists out of trouble.

Secondary parts of the work — other than the main report — can cause a problem.

A misleading or false headline potentially is defamatory. Images and their captions can also trigger a claim, especially if it is a photo of the wrong person who is innocent or uninvolved with the issue at hand.

Potential plaintiffs are not limited to the main subjects of the article. Incidental participants could have a claim, even if they are not identified by name but still are identifiable to people in their community.

Finally, it is not a defense to republish a defamatory statement — even if you accurately quote someone else saying it.



PROVING DEFAMATION cont'd

A defamatory statement quoted a second time may be actionable and the defamed person can bring claims against both the first and second person who make the statement. However, repeating a statement for the purpose of correcting it is not defamatory.

So before you publish your piece, it is good practice to consider what it takes to make a successful defamation claim and whether you should make adjustments to your piece.



For instance:

- Confirm your facts are accurate. If you did your research a while ago, you should double check to make sure there haven't been changes to the available information or new facts that you didn't have before.
- Do you have records to back up your assertions?
- Did you re-phrase things in a way that makes the information inaccurate or misleading?
- Did you thoroughly investigate the matter, and track down all reasonable leads, especially those that might have demonstrated contradictory facts?
- Are your sources trustworthy? Did they have an agenda that might suggest their information was not accurate?
- Did you accurately quote your sources and records?
- If your statement is opinion, is it clear this is an opinion piece (although as noted above, merely claiming opinion may not end the matter).

Knowing what it takes to prove defamation can not only strengthen your piece but reduce the chance of a successful lawsuit.

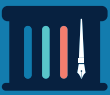
CORRECTIONS AND RESTRICTIONS

Despite your best efforts, you may still find yourself facing a defamation claim.

If you learn that something you published was incorrect, including when someone contacts you and asks you for a correction, your willingness to correct an error can provide several benefits.



- **FIRST**, being willing to correct your work could give you more credibility with those who see or hear your piece.
- **SECOND**, issuing a correction may satisfy the person who feels he or she was defamed, and the matter may end there.
- **THIRD**, if the person does file a claim against you, a correction may reduce the amount of damage the person can seek.



CORRECTIONS AND RESTRICTIONS cont'd

And this makes sense: If a defamatory statement is available only briefly, then there is likely to be fewer damages, as compared with a statement that is available for days, weeks or more.

A number of states have statutes that require a plaintiff to request a correction or retraction before they can recover certain types of damages in a defamation lawsuit.

Other states have the concept captured in its common law.

As Washington state lawmakers explained when they passed RCW 7.96 et seq., the goal of these laws is to balance constitutionally protected guarantees of free expression with the need to protect people from reputational harm:

Unlike personal injuries, harm to reputation can often be cured by means other than money damages. The correction or clarification of a published statement may restore a person's reputation more quickly and more thoroughly than a victorious lawsuit. The salutary effect of a correction or clarification is enhanced if it is published reasonably soon after a statement is made.
RCW. 7.96.010.

The protections vary widely, such as which journalists can claim the protections (some laws apply only to newspapers, others apply more broadly to media); the statutes typically require the plaintiff to seek the correction or retraction within a reasonable period of time (the definition of reasonableness varies); and if the publisher issues the retraction, the journalist may be shielded from certain types of damages (such as punitive damages or reputational damages.)

For instance, California's law provides protections to a "daily or weekly news publication" or "slander by radio broadcast."



Under the California retraction statute:

- A plaintiff has 20 days after discovering an allegedly libelous statement to make the request for retraction;
- The plaintiff must make the request in writing, specify the allegedly libelous statements and demand that they be corrected; and
- After receiving the request, the publisher has three weeks to publish a retraction that is "substantially as conspicuous" as the original published statements and in the same publication where the incorrect statement was made.

If the publisher follows these procedures after receiving a retraction request (or the plaintiff fails to ask for a retraction under the terms in the statute), the plaintiff's ability to recover damages will be limited if the claim succeeds.

He or she can recover only for his or her actual economic losses and will not be able to recover general damages (e.g., loss of reputation generally) or punitive damages. The statute also limits damages if the publisher runs the correction before receiving the retraction demand.



CORRECTIONS AND RESTRICTIONS cont'd

As another example, Washington's law requires plaintiffs to request a correction or clarification before filing a lawsuit.

If they do not, they cannot recover reputational or presumed damages at trial. The statute applies not just to defamation lawsuits, but to any claim targeted at an allegedly false statement. And perhaps most notably — unlike most state retraction laws — it expressly applies to all electronic publications. For defendants, moreover, the process is voluntary.

Under the law, a request for a correction or clarification is timely and sufficient if it is made within the statute of limitations for a defamation claim, identifies the person making the request, and specifies the allegedly false statement and why the requester believes it is defamatory or otherwise actionable.

If the publisher makes a timely and sufficient correction, the plaintiff may not recover reputational or presumed damages; damages are also limited if, upon request, the plaintiff refuses to disclose evidence of the statements' falsity. The filing of a defamation lawsuit constitutes a request for correction or clarification.

A correction is timely and sufficient if made within 30 days of receipt of a request for correction or clarification or of evidence of falsity and if the correction meets certain specifications.

If a publisher misses this deadline, it may offer to settle the dispute after the filing of a lawsuit by publishing a correction and paying the prospective plaintiff's reasonable attorneys' fees incurred before publication of the correction or clarification.

Ultimately, the decision to issue a correction or retraction should be reviewed carefully, especially if the request would be viewed as an admission of liability.

An attorney experienced in defamation law can provide guidance, including assessing the strength of the claim, whether your state has protections for issuing a correction, and how to follow procedures required under the law.



A journalist can never eliminate the risk of being sued for defamation. But ensuring the facts and presentation are accurate and not misleading will reduce the chances of a claim and potential damages — and increase the risk of winning if a claim was brought.