Liberty and Defamation

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It is almost a foregone conclusion that the U.S. Supreme Court's First Amendment jurisprudence and the evolution of common law libel are at odds. As Professor Prosser has observed, "our traditional notions of freedom of expression have collided violently with sympathy for the victim traduced and indignation at the maligning tongue."[1] However, many commentators have lately argued that the blending of constitutional concerns with the realities of litigating a defamation claim has tipped the scales too far in favor of defamation defendants, limiting recovery on otherwise viable defamation claims. This theory is somewhat misplaced because it makes the assumption that defamation can exist (as it once did) outside the context of the First Amendment. While it seems obvious that defamation and principles of free speech and press are at odds—defamation punishes inappropriate expression—that conclusion only considers the plaintiff's individual interests in prosecuting a defamation claim. The U.S. Supreme Court's decision in *New York Times v. Sullivan* squarely placed defamation within the theater of the marketplace of ideas, forever imbuing its application with First Amendment free speech and press concerns.[2] Lest we forget why the Court did this, perhaps it is time again to review the basic concepts underpinning modern defamation jurisprudence.

Defamation is usually characterized as a personal tort, but, unlike other such torts, the harm caused by defamation stems from the community's changed impressions of the defamed person. The *Restatement (Second) of Torts* characterizes a defamatory statement as one in which the communication so harms the reputation of another as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her.[3] Because the harm stems from the community, defamation can be characterized as a "communal" tort and, for this reason, is rightly subject to the other laws and policies governing the community, including its free speech and press interests.

The fundamental premise of the First Amendment is the marketplace of ideas. While some lower courts have endeavored to define the marketplace by giving it a context, the U.S. Supreme Court consistently treats the concept of a marketplace the same way that it treats the concept of free-market capitalism—as a framework.[4] So, somewhat like the guiding influence of Adam Smith's invisible hand, the marketplace of ideas is one of the fundamental theories of liberty inherent in the notion of democratic rule. The founders designed the First Amendment to protect the marketplace itself and not necessarily to regulate the ideas exchanged there. What the courts are protecting when they talk about First Amendment rights is the process by which information is exchanged rather than the result of that exchange.

Justice Oliver Wendell Holmes is credited with first employing the marketplace metaphor to expound on the free speech and press ideas embodied in the First Amendment. In *Abrams v. United States*, he wrote in a dissent that

> men . . . may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market and that truth is the only ground upon which their wishes safely can be carried out..[5]

Under Holmes's theory, the marketplace concept is not the goal of the First Amendment, but, rather, like so many other provisions of the Constitution, it is the playing field—the means in which to achieve the goal. More recent U.S. Supreme Court decisions confirm that principle.[6] Therefore, speech or expression that is imbued with First Amendment protection must fall within the context of the marketplace of ideas.

But it was not until *Sullivan* that the common law of defamation was put in the constitutional context.[7] Before 1964, defamation existed conceptually apart from the court's free speech and press jurisprudence.[8] Like many other common law torts, defamation was placed outside the marketplace of ideas, and even when it was treated as speech it was compared to obscenity and fighting words—receiving no First Amendment protection.[9]

However, that conception was clearly erroneous. Defamation, unlike categories of speech deemed without protection, is not a type of speech, but, rather, a remedy for harm caused by relaying facts that tend to diminish the character of the subject. Because some statements that may cause harm to the reputation are beneficial to society (for instance, when a reporter publishes a story about a crooked politician), the U.S. Supreme Court noted in *Sullivan* that false facts and ideas are not necessarily kicked out of the marketplace because of their mere falsity or harm to one's reputation. Those statements that deserve to remain (and are thus protected by the First Amendment) are statements capable of defamatory meaning but are nonetheless informative. Thus, the U.S. Supreme Court held in *Hustler v. Falwell*[10] that speech such as parody, rhetorical hyperbole, and satire, even though they may be false, clearly add beneficial discourse that might otherwise be prohibited by common law defamation.

The revelation of the *Sullivan* Court, then, was that speech characterized as defamatory under the common law (the underlying principles of which often predate the First Amendment) can simultaneously be beneficial to the public debate. The premise is consistent with the marketplace conceptualization: the goal of the First Amendment is to protect the marketplace, not that more elusive goal of assuring truth's victory therein. If the debate itself is what is protected, the plain reality is that we must ensure that both "truth" and "falsity" are permitted in the marketplace; otherwise, there is no debate.[11] Some types of falsity must be protected.

Recently, commentators have rationalized that the application of free speech and press principles to a defamation

claim has made recovery for defamation unreasonably difficult.[12] Disregarding the obvious impossibility of proving it in any manner other than anecdotally, this argument is based on two fundamental flaws in reasoning: first, that the application of First Amendment principles is at all uniform throughout the country; and second, that the burden of making out a prima facie case is the same thing as overcoming, where applicable, society's greater interest in protecting the marketplace of ideas.

As a general rule, an allegation of defamation becomes a free press concern when the publisher of the alleged defamatory statement is a media defendant.[13] When certain qualified privileges are invoked by the media defendant, the First Amendment concerns must be summarily dealt with to allow the claim to proceed. As one court put it, summary judgment "is especially appropriate in libel cases, for prolonging a meritless case through trial could result in further chilling of First Amendment rights."[14] When the First Amendment applies, the claim then becomes one for constitutional defamation and requires that plaintiffs not only satisfy the requirements of the tort, but also show that their recovery will not impinge society's greater interests in free speech and press. Unfortunately, however, the application of First Amendment principles as applied in defamation actions is inconsistent from state to state.

Although courts have held that the First Amendment principles apply to defamatory speech, they have been less willing to protect the newsgathering efforts of the media. Perhaps the best example of this is the application to defamation of the reporter's privilege. The reporter's privilege, stated generally, affords journalists who have been subpoenaed to reveal information collected in the course of news gathering constitutional protection from such subpoena on the basis that a general duty to comply with such subpoenas would have the effect of diminishing the poignancy and quantity of information made available in the marketplace of ideas. However, because of the U.S. Supreme Court's consistent refusal to clarify its thirty-year-old decision in *Branzburg v. Hayes*,[15] the application of that privilege is inconsistent from state to state, leading many state legislatures to take matters into their own hands and clarify the rule by adopting a shield law. Some commentators have argued that the application of the reporter's privilege to defamation claims prevents otherwise viable recovery. However, like many other complaints about the difficulty of recovery made by defamation plaintiffs, this complaint about the reporter's privilege is improperly characterized. The complaint should not be that the application of the First Amendment principle embodied in the reporter's privilege prevents otherwise maintainable claims, because such argument is premised on the improper conclusion that defamation, once it impinges on the First Amendment, can exist conceptually outside of it. The U.S. Supreme Court held in *Sullivan* that it cannot. The proper question to debate is the merits of the reporter's privilege itself. It is not that a claim barred by the application of the reporter's privilege would otherwise be maintainable. The real argument is that without the bar, society's interest in the protection of the marketplace would be either ignored or improperly decided without anyone representing and arguing for society at large.

Perhaps the best example of why the argument alleging the difficulty of making out a prima facie case where First Amendment principles applies is specious is in the context of the requirement that the defamed plaintiff show falsity. Where the First Amendment applies, the defamation plaintiff must show that the statement complained of is false.[16] Commentators have argued that because of free speech principles, including the application of the reporter's privilege, sufficient facts cannot be determined to show the falsity of the statement. But this argument is clearly incorrect. Falsity can be proved without the disclosure of information sensitive to First Amendment principles. Only statements understood to be based on provable facts are actionable. To show falsity, the defamation plaintiff only needs access to the statement complained of, which the First Amendment does not prevent, and not the circumstances under which the statement was made. Therefore, the defamation plaintiff's burden of proving falsity is not made difficult by placing defamation in the context of First Amend-

U.N. Tribunal Recognizes Reporter's Privilege

The United Nations war crimes tribunal on December 11, 2002, recognized the reporter's privilege for journalists working in war zones, and will compel testimony only if it is "of direct and important value in determining a core issue" and "cannot reasonably be obtained elsewhere."

The U.N. court also annulled its earlier order that would have required former *Washington Post* reporter Jonathan Randal to testify in the trial of alleged Serbian war criminal Radoslav Brdjanin. Randall had interviewed Brdjanin, now on trial for genocide, in 1993.

The judges said that if "war correspondents were to be perceived as potential witnesses for the prosecution," newsgathering would be hampered because interviewed people "may talk less freely . . . and may deny [war correspondents] access to conflict zones." Moreover, their own lives would be endangered if "they shift from being observers of those committing human rights violations to being targets."

The decision represents the first time that a modern war crimes court defined and upheld limited legal protection for reporters. Press advocates hope that the ruling will set the standard in other ad hoc tribunals and will define relations between war correspondents and the new International Criminal Court.

Thirty-four news organizations and professional groups submitted amicus briefs supporting Randall and the *Washington Post*. The appellants, and many of the amici, had asked for limited protection for "journalists in general," but the judges said their decision concerned war correspondents only, defined as people "who, for any period of time, report (or investigate for the purposes of reporting) from a conflict zone on issues relating to the conflict."

The winter 2003 (22:4) issue of *Communications Lawyer* will include an extended discussion of the tribunal's decision.

ment principles.

On the other hand, proof of actual malice requires some discovery of the circumstances surrounding the publication of the complained-of statement. Actual malice is knowledge that the statement is false or reckless without regard to whether the statement is true or false. To prove actual malice, the U.S. Supreme Court has enumerated several kinds of evidence that may be utilized by plaintiffs, including proof that the defendant entertained serious doubts as to the truth of his or her publication, proof that the statement was fabricated by the defendant, proof that the statement was the product of the defendant's imagination, or proof that there exist obvious reasons to doubt the veracity of the informant upon whom the statement is based or the accuracy of the statement being relied upon.[17] The courts have conceded that where proof of actual malice is at issue, information and facts that would tend to shed light on the reporter's state of mind are discoverable. To balance the defamation plaintiff's necessity to prove this element with society's interest in protecting the marketplace, the U.S. Supreme Court requires that proof of actual malice be made by clear and convincing evidence.[18]

Before free speech and press principles were applied to defamation, the tort was applied in whimsical fashion in ways that deterred certain types of speech from the marketplace of ideas. By putting defamation in context, the courts are finally making sense of it. There has been a rising tide of recent complaints that the balance of interests is swinging too far in favor of media defendants. But what these complaints ignore is that allowing the ancient tort of defamation to trounce the enlightened governing principle of free debate defeats the purpose of both, as well as other interests, including the overarching interest in uniformity. Not only would the vigor of public debate be diluted because fear of damage awards would prevent beneficial ideas from reaching the marketplace, but the anchoring principles embodied in the First Amendment would be unhooked, allowing the law of defamation to be driven more by regional aggression toward the media than by uniform concepts of righting reputational wrongs.

Endnotes

1. WILLIAM PROSSER, W. PAGE KEETON, DAN B. DOBBS, PROSSER AND KEETON ON TORTS § 111, at 772 (5th ed. 1984).

2. New York Times v. Sullivan, 376 U.S. 254 (1964).

3. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

4. *See, e.g.*, United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 464 (1995) (observing that "[f]ederal employees who write for publication in their spare time have made significant contributions to the marketplace of ideas"); Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 116 (1991) (citing New York's "Son of Sam" law for the proposition that "the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace").

5. Abrams v. United States, 250 U.S. 616, 630 (1919).

6. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 598 (1980) (Rehnquist, J., dissenting) ("The free flow of information is important . . . not because it will lead to the discovery of any objective 'truth', but because it is essential to our system of self government.").

7. *Sullivan*, 376 U.S. at 254.

8. ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS § 1.1 (3d ed. 1999).

9. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.").

10. 485 U.S. 46, 55 (1988).

11. SACK, *supra* note 8, § 1.1 ("Courts applying and developing the common law have long recognized that control of words in order to protect reputation has an impact on the freedoms to speak and to write.").

12. For instance, see the article by Sandy C. Patrick and Richard J. Keshian in this edition of *Communications Lawyer*.

13. Milkovich v. Lorain Journal Co., 497 U.S. 1, 1 (1990).

14. Anderson v. Stanco Sports Library, Inc., 542 F.2d 638 (4th Cir. 1976).

15. 408 U.S. 665 (1972).

16. PROSSER AND KEETON ON TORTS, *supra* note 1, §§ 111, 116; Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986).

17. St. Amant v. Thompson, 390 U.S. 727 (1968).

18. New York Times v. Sullivan, 376 U.S. 254 (1964).