



Defamation: Falsity

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Falsity includes two questions:

- Was the statement of fact (rather than of opinion)?
 - In other words, is it theoretically capable of being false?
 - APSB 341-342
- Is the statement not true?
 - In other words, is it actually false?
 - APSB 342-343

Fact vs. opinion

- Only statements of purported fact can be defamatory.
- Opinion is protected.
- What counts as non-actionable opinion can be a close issue.

Fact vs. opinion

- In considering whether a statement is a factual/actionable one, courts will consider:
 - The context
 - Whether the statement is provably false
 - Precision and specificity of language
 - Words of apparency, cautionary language
 - The medium
 - The intended audience

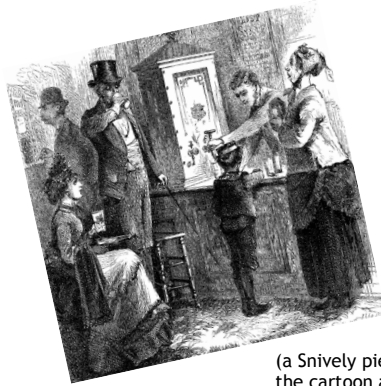
Is it not true?

- The touchstone is substantial truth.
 - This can work for or against the plaintiff.
- Burden of proof
 - Depends on constitutional analysis
- Jury issue - As an issue of fact, it's generally for the jury to decide.

Realotheticals...

Snively v. Record Publishing Co.

(Cal. 1921)



(a Snively piece, but not
the cartoon at issue)

Fact vs. Opinion

Snively v. Record Publishing Co.

(Cal. 1921)

Political cartoon suggested the chief of the LAPD was secretly receiving money for illegal purposes.

Factual? No.

The cartoon was protected as fair comment. Political cartoons get “running room” from courts, as the it is intrinsic to the genre that facts are stretched and exaggerated for the purpose of advancing a pointed commentary.

Obsidian Finance Group v. Cox (D. Or. 2011)



Fact vs. Opinion

Obsidian Finance Group v. Cox (D. Or. 2011)

Cox's blogged allegations against Padrick included money laundering, perpetrating "fraud on the courts," and engaging in various "illegal activity."

Cox blogged that Padrick was a "Thief," a "CRIMINAL," and a "Corrupt Attorney."

Obsidian Finance Group v. Cox

(D. Or. 2011)

Cox asserted that “a Whole Lot” of the “Truth” is “Coming Soon,” that she “intend[s] to Expose every Dirty Deed,” that Padrick “WILL BE EXPOSED,” that “YOU [meaning plaintiff person] will BE Indicted SOME TIME, someday,” and that she “WILL PROVE IT ALL.” She told the reader to “STAY TUNED,” and she asked “Kevin Padrick, Guilty of Tax Fraud?” She also stated that Padrick is a “cold hearted evil asshole” and is a “Cruel, Evil Discriminating Liar.” ...

Obsidian Finance Group v. Cox

(D. Or. 2011)

Defamatory?

No.

Obsidian Finance Group v. Cox

(D. Or. 2011)

Because of the “looser, more relaxed communication style” of blogs, it was not defamatory for blogger Crystal Cox of obsidianfinancesucks.com to accuse bankruptcy trustee Kevin Padrick of various forms of perfidy.

Obsidian Finance Group v. Cox

(D. Or. 2011)

From the opinion:

Defendant’s use of question marks and her references to proof that will allegedly occur in the future negate any tendency for her statements to be understood as provable assertions of fact. Her statements contain so little actual content that they do not assert, or imply, verifiable assertions of fact. They are, instead, statements of exaggerated subjective belief such that they cannot be proven true or false.

Considering all of the statements in the record under the totality of circumstances, the statements at issue are not actionable assertions of fact, but are constitutionally protected expressions of opinion. Plaintiffs’ motion for summary judgment on the liability of the defamation claim is denied.

Moldea v. New York Times
(D.C. Cir. 1994)



Fact vs. Opinion

Moldea v. New York Times
(D.C. Cir. 1994)

“But there is too much sloppy journalism to trust the bulk of this book's 512 pages — including its whopping 64 pages of notes.”

- *from the article*

Is this a factual assertion?

Yes.

Moldea v. New York Times

(D.C. Cir. 1994)

From the opinion:

It is true that whether a book is "sloppy," and indeed whether there is "too much" sloppiness, as Eskenazi stated in his review, may involve an element of subjective evaluation. However, whether an epithet represents a reviewer's "opinion" simply is not dispositive of the question before us. Although "sloppy" in a vacuum may be difficult to quantify, the term has obvious, measurable aspects when applied to the field of investigative journalism. (Similarly, an accusation of "clumsy hands" may be amorphous in and of itself, but reasonable listeners would agree as to its implications when applied to a brain surgeon).