



Defamation 1: Constitutional Analysis

Torts
Eric E. Johnson
ericejohnson.com



Kononmark
Most rights sharable

TORTS - Constitutional Law Defamation Flow Chart

FIRST AMENDMENT APPLICABILITY:

Is the plaintiff a public official or public figure, or does the statement involve a matter of public concern?

NO → the First Amendment does not come into play, just analyze under the common law

GO ON TO
COMMON LAW
ANALYSIS

YES → the First Amendment does come into play

Is the plaintiff a **public official or public figure**, or is the plaintiff a **private person**?

PUBLIC OFFICIAL OR PUBLIC FIGURE → the plaintiff must prove, as part of the prima facie case, that the statement is **false**, that is, that the statement is purported fact (as opposed to opinion) and is not true, **AND** the plaintiff must prove the defendant's **actual malice**, that is, that the defendant acted with knowledge that the statement was false or with reckless disregard as to the truth or falsity of the statement

PRIVATE PERSON RE MATTER OF PUBLIC CONCERN → the plaintiff must prove, as part of the prima facie case, that the statement is **false**, that is, that the statement is purported fact (as opposed to opinion) and is not true, **AND** the plaintiff must, either:

prove the defendant's **actual malice**, that is, that the defendant acted with knowledge that the statement was false or with reckless disregard as to the truth or falsity of the statement

OR

prove **negligence** (not taking the care the reasonable person would in concerning the truth or falsity of the statement) plus **actual injury**, such as lost wages or sales

GO ON TO
COMMON LAW
ANALYSIS

(modifying elements and defenses as relevant)

FIRST AMENDMENT APPLICABILITY:

Is the plaintiff a public official or public figure, or does the statement involve a matter of public concern?

NO → the First Amendment does not come into play, just analyze under the common law



GO ON TO
COMMON LAW
ANALYSIS

YES → the First Amendment does come into play



Is the plaintiff a **public official or public figure**, or is the plaintiff a **private person**?

PUBLIC OFFICIAL OR PUBLIC FIGURE → the plaintiff must prove, as part of the prima facie case, that the statement is **false**, that is, that the statement is purported fact (as opposed to opinion) and is not true, **AND** the plaintiff must prove the defendant's **actual malice**, that is, that the defendant acted with knowledge that the statement was false or with reckless disregard as to the truth or falsity of the statement

PRIVATE PERSON RE MATTER OF PUBLIC CONCERN → the plaintiff must prove, as part of the prima facie case,

Is the plaintiff a **public official or public figure**, or is the plaintiff a **private person**?

PUBLIC OFFICIAL OR PUBLIC FIGURE → the plaintiff must prove, as part of the prima facie case, that the statement is **false**, that is, that the statement is purported fact (as opposed to opinion) and is not true, **AND** the plaintiff must prove the defendant's **actual malice**, that is, that the defendant acted with knowledge that the statement was false or with reckless disregard as to the truth or falsity of the statement

PRIVATE PERSON RE MATTER OF PUBLIC CONCERN → the plaintiff must prove, as part of the prima facie case, that the statement is **false**, that is, that the statement is purported fact (as opposed to opinion) and is not true, **AND** the plaintiff must, either:

prove the defendant's **actual malice**, that is, that the defendant acted with knowledge that the statement was false or with reckless disregard as to the truth or falsity of the statement

OR

prove **negligence** (not taking the care the reasonable person would in concerning the truth or falsity of the statement) **plus actual injury**, such as lost wages or sales

GO ON TO
COMMON LAW
ANALYSIS

(modifying elements and
defenses as advised)





Realothenicals...

Public official?

- U.S. naval officer, rank of captain, skipper of a destroyer escort

Public official?

- U.S. naval officer, rank of captain, skipper of a destroyer escort
- **Yes.**
Arnheiter v. Random House (9th Cir. 1978)

Public official?

- Police officer with duties as a “normal street patrolman” of the lowest rank in a town of 30,000

Public official?

- Police officer with duties as a “normal street patrolman” of the lowest rank in a town of 30,000
- **Yes.**
Gray v. Udevitz (10th Cir. 1981)

Public official?

- Police informant who received no salary, but was reimbursed some expenses

Public official?

- Police informant who received no salary, but was reimbursed some expenses
- **No.**
Jenoff v. Hearst (4th Cir. 1981)
- But noting: “We do not rely solely on Jenoff’s lack of formal government position for our conclusion that he is not a public official. It is conceivable that an individual holding no formal public position, and standing in no employment or even contractual relationship with government, nevertheless may participate in some governmental enterprise to such an extent that the policies underlying *New York Times Co. v. Sullivan* ... would demand that he or she be classified a public official.”

Public official?

- Financial aid director at a public college

Public official?

- Financial aid director at a public college

- **Yes.**

Van Dyke v. KUTV (Utah 1983)





Public figure?

“Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures.”

Gertz v. Robert Welch, 418 U.S. 323, 342 (1974)

Public figure?

The designation of *public figure* “may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.”

Gertz v. Robert Welch, 418 U.S. 323, 351 (1974)

Public figure?

General-purpose public figure

The designation of *public figure* “may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.”

Gertz v. Robert Welch, 418 U.S. 323, 351 (1974)

Public figure?

General-purpose public figure

A public figure "may rest on the bases. In some individuals may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public controversies. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)

Limited-purpose public figure

Public figure?

The designation of public figure

**"Generally, an individual can become a limited purpose public figure only through his own actions."
Biro v. Condé Nast (S.D.N.Y. 2013)**

More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public controversies. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)

Limited-purpose public figure

Realothenicals...

Public figure?

- Bose - makers of the heavily advertised Bose Wave Radio

Public figure?

- Bose - makers of the heavily advertised Bose Wave Radio
- **Yes.**
Bose v. Consumers Union (Consumer Reports magazine) (U.S. 1984)

Public figure?

- Telemarketer of subscriptions to newsletters employing 500 telephone representatives and reaching 15,000 customers per week

Public figure?

- Telemarketer of subscriptions to newsletters employing 500 telephone representatives and reaching 15,000 customers per week
- **Yes - limited-purpose public figure.**
American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania (Pa. 2007)

Public figure?

- Government contractor that provided civilian interrogators for U.S. Army intelligence brigade

Public figure?

- Government contractor that provided civilian interrogators for U.S. Army intelligence brigade
- **Yes.**
CACI Premier Technology, Inc. v. Rhodes
(4th Cir. 2008)

Public figure?

- Larry Klayman, founder and former chair of Judicial Watch, a public-interest law firm; frequent guest on TV, cable, radio; and has "celebrity status within the non-profit legal/political community"

Public figure?

- Larry Klayman, founder and former chair of Judicial Watch, a public-interest law firm; frequent guest on TV, cable, radio; and has "celebrity status within the non-profit legal/political community"
- **Yes - general-purpose public figure.**
Klayman v. Judicial Watch (D.D.C. 2009)

Public figure?

- Rev. Norwood Thompson, Jr., pastor of the First Zion Baptist Church in New Orleans, civically active, and the subject of some local media coverage regarding his activities

Public figure?

- Rev. Norwood Thompson, Jr., pastor of the First Zion Baptist Church in New Orleans, civically active, and the subject of some local media coverage regarding his activities
- **Yes - general-purpose public figure.**
Thompson v. Emmis Television Broadcasting
(La. App. 2005)

Public figure?

- Local television news reporter who broadcast more than 1,000 stories, participated in at least four public charitable events and considered herself a local celebrity.

Public figure?

- Local television news reporter who broadcast more than 1,000 stories, participated in at least four public charitable events and considered herself a local celebrity.
- **No.**
Wayment v. Clear Channel Broadcasting (Utah 2005)

Public figure?

- Owner of business that customized jetskis who posted to internet news group rec.sports.jetski and who was interviewed by *SPLASH* magazine

Public figure?

- Owner of business that customized jetskis who posted to internet news group rec.sports.jetski and who was interviewed by *SPLASH* magazine
- **Yes - limited-purpose public figure.**
Hibdon v. Grabowski (Tenn. App. 2005)
- Court noted that rec.sport.jetski is an internet site that “is accessible worldwide.”

"Hibdon himself knowingly and consciously sought publicity for his jet ski business by his initial postings on rec.sport.jetski. The controversy began following Hibdon's posting on the news group of the success of his jet ski modifications, prior to the publishing of the defamatory statements made by the Defendants. The controversy was “public” due to the international reach of the Internet news group rec.sport.jetski, the national circulation of *SPLASH* Magazine, as well as the significance of the claims being asserted by Hibdon [“builder of some of the fastest jet skis on planet Earth”].”
Hibdon v. Grabowski (Tenn. App. 2005)

IMPORTANT NOTE:
confusing ≠ confused

Remember: If you find it all confusing, it doesn't mean you are confused; it's actually a leading indicator that you understand.

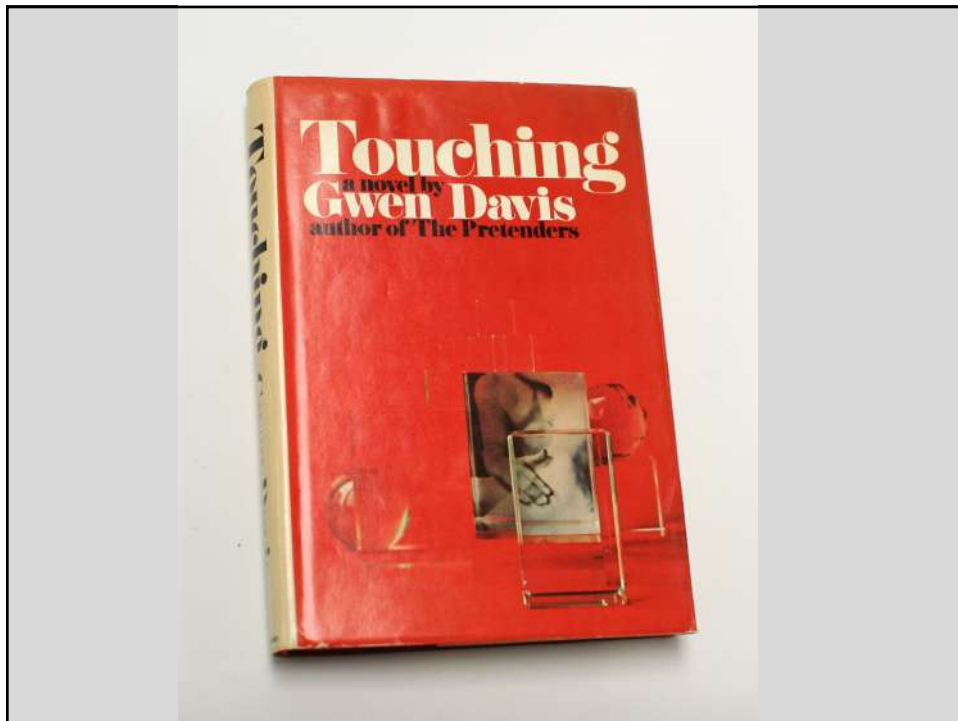
Public figure?

- Religious sect leader who leads “an ongoing public conversation on religion, addressing Internet users on a frequent basis from her own Verified Twitter account, which has 17,221 followers,” “produced dozens of publicly accessible online video teachings which have been viewed over 143,000 times,” and “makes her public teachings available to her followers through the Buddhist KPC website which she founded.”

Public figure?

- Religious sect leader who leads “an ongoing public conversation on religion, addressing Internet users on a frequent basis from her own Verified Twitter account, which has 17,221 followers,” “produced dozens of publicly accessible online video teachings which have been viewed over 143,000 times,” and “makes her public teachings available to her followers through the Buddhist KPC website which she founded.”
- **Yes - “an easily identifiable public figure.”** *U.S. v. Cassidy (D. Md. 2011)* (criminal stalking context rather than defamation)

Bindrim v. Mitchell



Is the plaintiff a **public official or public figure**, or is the plaintiff a **private person**?

PUBLIC OFFICIAL OR PUBLIC FIGURE → the plaintiff must prove, as part of the prima facie case, that the statement is **false**, that is, that the statement is purported fact (as opposed to opinion) and is not true, **AND** the plaintiff must prove the defendant's **actual malice**, that is, that the defendant acted with knowledge that the statement was false or with reckless disregard as to the truth or falsity of the statement

PRIVATE PERSON RE MATTER OF PUBLIC CONCERN → the plaintiff must prove, as part of the prima facie case, that the statement is **false**, that is, that the statement is purported fact (as opposed to opinion) and is not true, **AND** the plaintiff must, either:

prove the defendant's **actual malice**, that is, that the defendant acted with knowledge that the statement was false or with reckless disregard as to the truth or falsity of the statement

OR

prove **negligence** (not taking the care the reasonable person would in concerning the truth or falsity of the statement) plus **actual injury**, such as lost wages or sales

GO ON TO
COMMON LAW
ANALYSIS
*(modifying elements and
defenses as advised)*