

# Trade Libel & Defamation: An Open Casebooklet

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adapted from

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Eric E. Johnson

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## Editing Notes

In editing the case text, I have strived primarily for readability and brevity. Thus, I have been quite liberal in cutting down courts' text, and, in some cases, re-arranging it.

Please see the full book *Torts Cases & Context* for more information on editing.

I have adopted these convention for marking certain edits:

↘ The superscript right-pointing descending arrow indicates the beginning of footnote material.

↙ The superscript left-pointing descending arrow indicates the end of a passage of footnote material.

~ The superscript tilde denotes matter omitted.

[] Brackets indicate an insertion. The insertion may be mine or the court's. They are usually mine if they are not in a quote.

I also have made unmarked changes. In such cases, I left them unmarked because marking them in some way would have been unduly distracting. In particular, throughout the cases, I have liberally omitted citation matter, including parallel cites, portions of cites, and whole cites. Other unmarked edits are cataloged in the aftermatter at the end of the book *Torts Cases & Context*.

# 1. Trade Libel and Product Disparagement

## **A. Terminology: “Trade Libel,” “Defamation,” “Product Disparagement”**

The term “trade libel” is used by different people to mean different things. “Trade libel” is sometimes used to refer to a corporation or business entity suing for defamation (as opposed to a natural person suing). In that case, the business entity’s claim is based on the business entity’s reputation.

On the other hand, “trade libel” is used by many sources to mean a cause of action distinct from defamation, with the understanding that defamation is an injurious falsehood about a person (natural or corporate), and trade libel is an injurious falsehood about a product, service, or maybe a piece of property. This second sense is often called “product disparagement.”

## **B. Substance: How Product Disparagement Claims Differ from Claims of Defamation of a Legal Person**

Generally speaking, defamation of a corporation involves much of the same doctrine as defamation against a person, but requirements are added, making the claim more difficult for plaintiffs.

Product disparagement is regarded as being a much stricter, more demanding claim for a plaintiff to bring. A plaintiff has been said to have “very limited rights” to sue over falsehoods said about a product. Among the stricter requirements: Special damages are always required (e.g., proving an itemized list of lost sales). The plaintiff must prove falsity. The plaintiff must prove actual malice (or even more, such as intent to dissuade sales). And the plaintiff may have to prove that pecuniary damages were foreseeable by or intended by the defendant. In some cases, industries have pushed for legislation to create statutory causes of action for disparagement of particular products, such as meat

or other agricultural products. All such claims – whether statutory or common-law based – implicate free speech concerns.

### **C. Extradiegesis: Law Which Makes No Sense**

The landscape of defamation, trade libel, product disparagement, and so on is a thorny one, subject to great variation among jurisdictions and a lot of fuzziness and cloudiness.

Don't look too hard for conceptual cohesiveness.

The Fifth Edition of *Prosser and Keeton on Torts* offers this useful nugget in the first paragraph of its defamation chapter: “It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense.”

Well said.

## 2. Defamation

“Words are, in my not-so-humble opinion, our most inexhaustible source of magic. Capable of both inflicting injury, and remedying it.”

– Albus Dumbledore, *Harry Potter and the Deathly Hallows*, by J.K. Rowling, 2007

“Most writers regard truth as their most valuable possession, and therefore are most economical in its use.”

– attributed to Mark Twain

### A. Introduction

Defamation is all about reputation and falsehoods. As a cause of action, it applies when a defendant makes false statements that are harmful to a plaintiff’s reputation.

At first blush, defamation may seem to be something of an island, unconnected to the rest of the doctrinal landscape of torts. But at an instinctual level, it has something in common with the intentional torts of battery, assault, false imprisonment and intentional infliction of emotional distress. All these torts might be thought of as a suite of doctrines protecting a person’s right to not be “messed with.” While the tort of battery protects a person’s sense of bodily integrity, defamation and the various privacy torts (covered in the next chapter) protect a person’s non-corporeal integrity. Defamation recognizes that we are more than our bodies. Our existence is also defined by our relationships with others. Thus, our protectable personal interests run to the web of interconnected impressions about us held in the imagination of others.

Although simple in concept, American defamation is complex as a matter of legal doctrine. There are two parts to the analysis. First is the common law, which itself is labyrinthine. Second is the First

Amendment analysis imposed by the U.S. Supreme Court, which changes the requirements for defamation cases where important free-speech values are at play.

## **B. The Basic, Unconstitutionalized Doctrine of Defamation**

To begin to explore the tort of defamation, we will start with a basic, blackletter formulation of the tort in its unconstitutionalized form (where the First Amendment does not come into play):

A plaintiff can establish a **prima facie case for defamation** by showing: (1) A defamatory statement (2) regarding a matter of fact (3) that was of and concerning the plaintiff (4) was published by the defendant, and (5) an extra condition is satisfied, being either that (a) the statement constitutes libel per se, (b) the statement constitutes libel per quod, (c) the statement constitutes slander per se, or (d) special damages are proven.

One thing you should notice about the prima facie case for defamation is that proving the falsity of the statement is not required. At its heart, defamation is about falsehoods, but the prima facie case – in its unconstitutionalized form – only requires that the plaintiff show the reputation-harming aspect of the defendant’s statement. The issue of falsity is not the plaintiff’s to prove. Instead, common-law defamation sees truth as an affirmative defense.

## **C. Defamatory Statement**

The essence of a defamatory statement is that it is reputation-harming. “A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” *Nuyen v. Slater*, 372 Mich. 654 (Mich. 1964).

The reference point for “reputation” is the whole community or, at least, some substantial and morally respectable group. Calling someone a murderer clearly qualifies as reputation-harming, for instance, because pretty much everyone considers committing murder to reflect

poorly on someone's character. But what about something that is only reputation-harming in certain circles? That's where the substantial-and-morally-respectable-group requirement comes in. Suppose someone is falsely said to be Jewish. That's not defamatory – notwithstanding that such a statement might tend to harm one's reputation among the neo-Nazis. The neo-Nazis are not a morally respectable group. So the fact that a statement harms one's reputation among them can't make it defamatory.

### **The Per Se Categories**

Under traditional defamation law, certain kinds of statements are considered **per se** defamatory. (The Latin "per se" means "in itself" and can be translated as "as such.") In other words, there is no need to debate the issue or ask a jury to determine whether these statements are reputation-harming. Statements from the per se categories are reputation-harming *as such*. End of discussion.

There are four categories of per se defamation: (1) making a statement that is adverse to one's profession or business, (2) saying that a person has a loathsome disease, (3) imputing guilt of a crime of moral turpitude, (4) imputing to a person a lack of chastity.

Let's take these in turn.

The first per se category is a statement **adverse to one's profession**. An example would be calling a lawyer a liar. Since honesty is essential in the legal profession, saying that a lawyer is dishonest is to harm the lawyer's professional reputation. Whether a statement is adverse to one's profession clearly depends on the profession. Saying that an accountant is "bad with numbers" is to make a statement adverse to that person's profession. But saying that an actor or poet is bad with numbers would not have the same effect.

The second per se category is **loathsome disease**. Leprosy and sexually transmitted diseases are leading examples. (The persistence of leprosy as a leading example – even though leprosy these days is easily treatable – highlights the ancientness of this legal doctrine.) There is no list of other diseases that qualify as "loathsome," but presumably

any disease that would generally cause others to shun the sufferer could qualify.

The third per se category is imputing **guilt of a crime of moral turpitude**. Categorizing certain crimes as morally turpitudinous is not just a defamation concept – it comes up under multiple areas of law. In U.S. immigration law, for instance, a conviction for a crime of moral turpitude can make a non-citizen deportable. And in legal ethics, a conviction for a crime of moral turpitude can be cause for disbarment or denial of admission to the bar. Despite its cross-category significance, however, the boundaries of what constitutes a crime of moral turpitude are fuzzy. One court hearing a defamation case has said that “moral turpitude involves an act of inherent baseness, vileness or depravity in the private and social duties which man does to his fellow man or to society in general, contrary to the accepted rule of right and duty between man and law.” *Lega Siciliana Social Club, Inc. v. St. Germaine*, 77 Conn. App. 846 (Conn. App. 2003) (internal quotes omitted). Recently, in the immigration context, a crime involving moral turpitude has been described as “conduct that shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.” *Da Silva Neto v. Holder*, 680 F.3d 25, (1st Cir. 2012). As to what crimes are in or out, it can be said with a certainty that murder, rape, and mayhem (assaults causing permanent injury, such as disfigurement or dismemberment) are crimes of moral turpitude. Crimes that involve lying, such a perjury and forgery, are also moral-turpitude crimes. Theft crimes, however, are more of a toss up – some being turpitudinous, others not. Larceny under false pretenses has been held morally turpitudinous. But simple shoplifting might not be.

The fourth category is imputing a **lack of chastity**. Chastity is abstaining from sex altogether, or, for married persons, abstaining from sex outside of the marriage. Originally, this doctrine only applied for female plaintiffs, but modern courts have extended it to cover male plaintiffs as well. And the category has also been used to cover statements short of alleging sexual intercourse, such as saying that a person has made sexual advances or evinced a willingness to engage in

sexual intercourse. Different, but within the same sphere of subject matter, some courts have concluded that an allegation of impotence is per se defamatory.

### **Beyond the Per Se Categories**

To be defamatory, a statement need not be per se defamatory. Any statement that tends to be reputation-harming can be held defamatory. Statements that have been held to be defamatory outside the per se categories include imputing that someone is mentally ill, abuses drugs, is bankrupt or financially irresponsible, or is dishonest.

Courts “take the world as it is” when deciding what is defamatory, even if doing so seems to give credence to wrong-headed thinking. For instance, while there is nothing wrongful about being a victim of rape, some courts have held that making a statement that someone is a rape victim is defamatory. And as of a few years ago, most courts held imputing that someone is of lesbian, gay, or bisexual orientation was defamatory. The current trend, however, is toward holding that such imputations are not defamatory.

Other changes in what is considered reputation-harming reflect great arcs of American history. Calling someone a Communist was generally not considered defamatory before World War II. But during the Cold War, it was.

### **D. Regarding a Matter of Fact**

To count as defamation, the statement at issue must be regarding a matter of fact. Opinion is off-limits for defamation plaintiffs.

The difference between what counts as a factual assertion and what is non-actionable opinion can often be a close issue, but the court will consider the context in which the statement is made, the medium, the intended audience, and whether the statement is theoretically provable.

In the case of *Obsidian Finance Group v. Cox*, 2011 WL 2745849 (D. Or. 2011), blogger Crystal Cox used a blog called *obsidianfinancesucks.com* to make a variety of withering comments about Obsidian Finance Group and bankruptcy trustee Kevin Padrick. Judge Marco A. Hernández held her blogging to be non-actionable opinion:

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[T]he statements are not sufficiently factual to be susceptible of being proved true or false. Cox repeatedly poses her statements as questions or asserts that she will prove her accusations. For example, she asserts 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 Padrick] will BE Indicted SOME TIME, someday,” and that she “WILL PROVE IT ALL.” She tells the reader to “STAY TUNED,” and she asks “Kevin Padrick, Guilty of Tax Fraud?” She also states that Padrick is a “cold hearted evil asshole” and is a “Cruel, Evil Discriminating Liar.”~

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.

The *Cox* case points up the fact that the more wild and outlandish the language and medium, the less likely the content will be taken as factual. Outsized invective and wanton use of capital letters or bold type seem to move the needle toward the safe zone of protected opinion. On the other hand, sobriety of language and prestige of the

forum make it easier to push toward the red line of actionable assertions of fact.

### **E. Of and Concerning the Plaintiff**

The requirement that the statement be of and concerning the plaintiff means that the statement must somehow identify the plaintiff. This is easy in cases where the defendant calls out the plaintiff by name. But identification need not be express. It can be implied.

Suppose the defendant never uses the plaintiff's name, but says, instead, "You all know who I'm talking about." Has the plaintiff been identified? That will be an issue of fact. A jury will have to decide whether the audience would have understood that the defendant was referring to the plaintiff.

As with defamatory meaning, identification of the plaintiff can arise by accident. This sometimes happens in media that juxtaposes images and words, such as television shows or magazines.

Suppose a magazine runs a story about pathological liars next to a file photo of lawyers exiting a courthouse. If readers tend to think that the lawyers pictured are examples of the pathological liars the story is talking about, then the of-and-concerning-the-plaintiff element of the tort is met.

### **F. Published by the Defendant**

Defamation requires communication, and communication cannot happen without at least two people – a sender and a receiver. Thus, to be actionable, a defamatory statement must be "published" to at least one person, not including the plaintiff.

The word "published" here is a term of art. A statement is published in the defamation sense if it is uttered to a person who hears it. The requirement has nothing to do with publication in a formal sense, such as by a respected newspaper or book publisher. Uttering something aloud or writing it on a post-it note will count as publication as long as at least one other person hears or reads the message.

Note that you can not defame a person by communicating only to that person. Defamation is about reputational harm, not insult. So unless

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someone other than the plaintiff and the defendant perceives the statement, there can be no effect on the plaintiff's reputation, and thus there's no cause of action.

### **G. Libel Per Se, Libel Per Quod, Slander Per Se, Special Damages**

On top of the above-discussed four elements, defamation needs something more. This "something extra" can be enumerated as the fifth element of a prima facie case for defamation. But instead of there being one element the plaintiff must prove, the plaintiff need merely show one of four alternatives.

Here are the four different ways to satisfy this final requirement for a prima facie defamation case:

- (a) the statement constitutes libel per se,
- (b) the statement constitutes libel per quod,
- (c) the statement constitutes slander per se, or
- (d) special damages are proven

No doubt you have heard the words "libel" and "slander." Well, this is where those words are relevant. And it is at this point that we must understand **the distinction between libel and slander.**

The word **libel** refers to defamation that comes in writing or in some other permanent, non-ephemeral form. By contrast **slander** refers to defamation that is uttered as speech or is otherwise ephemeral. Because a written falsehood is presumed to be capable of more damage than a falsehood uttered into the air, the barriers to suing over libel are lower than they are to suing over slander.

You may wonder whether defamation by radio or television broadcast counts as libel or slander. That's a good question. The jurisdictions are split. It's libel in some, slander in others. The courts in Georgia found the question troubling enough to put defamation by broadcast under the heading of a newly minted tort, which they call "defamacast." *See, e.g., Jaillett v. Georgia TV Co.*, 520 S.E.2d 721, 724 (Ga. App. 1999).

Given the disarray over broadcasting, you will not be surprised to hear that whether defamation over the internet should be categorized as

libel or slander remains a largely unresolved question. At least some jurisdictions, however, have categorized internet defamation as libel.

Now that we have some understanding of “libel” and “slander,” we can talk about what counts as “slander per se,” “libel per quod,” and “libel per se.” Although jurisdictions vary, the following are helpful generalizations:

A statement is **slander per se** if it is slander (meaning it doesn’t rise to the level of qualifying as libel), and if it fits within one of the per se categories discussed above. To review, those per se categories are adverse to one’s profession, having a loathsome disease, guilt of a crime of moral turpitude, and having a lack of chastity. If it fits within one of those categories, then it qualifies as slander per se, and the final requirement of the defamation case is satisfied.

A statement is **libel per quod** if it is libel (as opposed to slander), if some external information is needed to understand its defamatory nature, and if it fits within one of the per se categories. The Latin “per quod” means “meaning whereby” – it refers to the necessity of having some external information to understand the meaning. In other words, a statement that is libel per quod is not defamatory on its face, but it is defamatory once context is taken into account.

Here’s an example of a libel per quod issue. Imagine that a newspaper prints a notice that “Doris Orband Sydney of Throgs Bay and Basil Keane Arbuckle of West Orange Hill are deeply in love and engaged to be married, with a ceremony to be held next Saturday.” Nothing about this engagement notice is defamatory on its face. But taking into account external factors, it might be. Suppose newspaper readers know that Ms. Sydney and Mr. Arbuckle are both married to other people. In that case, the extrinsic facts of their existing marriages makes the engagement notice defamatory because it imputes a lack of chastity to the alleged couple. (Botched engagement notices have, in fact, been a recurrent source of libel per quod cases.)

A statement is **libel per se** if it is libel and if no external information is necessary to understand its defamatory meaning. So long as the communication counts as libel and its defamatory meaning is clear on its face, then it fulfills the fifth element’s extra condition and is

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actionable. This means that *libel per se qualifies as actionable regardless of whether its content fits within any of the per se categories*. If that sounds confusing, you heard it correctly: Despite having “per se” in its name, libel per se does not need to fit within one of the per se categories. The per se categories are, instead, used for slander per se and libel per quod. (Clearly, no one designed these terms for ease of learning.)

For an example of libel per se, suppose this is printed in the newspaper: “Ozella Grantham Clifton of Upper Larnwick, a noted methamphetamine addict, is a bankrupt spendthrift.” This is libel per se because it is libel (as opposed to slander), it is reputation-harming, and no external information is needed to understand its defamatory meaning. Thus, it won’t matter that the facts attributed to Ozella Grantham Clifton don’t fall into any of the per se categories. This statement will be actionable as libel per se.

Now, if a statement is defamatory, but it doesn’t qualify as slander per se, libel per quod, or libel per se, it can still be actionable if the plaintiff can prove **special damages**. In this case, “special” means *specific* (as opposed to unique). Special damages are those damages that are provably quantifiable in dollars lost. For instance, if the plaintiff is paid on a commission basis and loses sales because of a reputation-harming statement, there are special damages. Getting fired or not being hired would count as well. What will not count as special damages is a *general* lowering of one’s esteem in the community.

### **Check-Your-Understanding Questions About the Extra Condition**

Do the following satisfy the extra condition required for a prima facie defamation case? If so, on what grounds?

- A.** A statement uttered in spoken conversation that accuses the plaintiff of being a terrorist sympathizer.
- B.** A written statement that, given extrinsic facts known to most in the community, clearly insinuates that the plaintiff committed perjury.
- C.** A written statement clearly accusing the plaintiff by name of being a heroin addict.

**D.** An oral statement that the plaintiff frequently daydreams of ways of inflicting physical injury on her or his boss, along with evidence showing that this statement caused the plaintiff's dismissal from employment.

**E.** A whispered statement that the plaintiff is sick with a weaponized form of smallpox, readily communicable through the air.

### **H. Defamation and the First Amendment**

In the landmark case of *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court held that the First Amendment guarantee of free speech alters and restricts common-law defamation. Thus, through *New York Times v. Sullivan* and subsequent cases, the court has constitutionalized the law of defamation.

To perform the constitutional analysis, you must first begin with this question: Is the plaintiff a public official or public figure, or does the statement involve a matter of public concern? If the answer is yes, then the First Amendment comes into play. If the answer is no, then First Amendment has nothing to say about the case, and the original common-law analysis under state law will control.

What the First Amendment does – if it comes into play – is change around the elements and defenses of the common-law analysis. What changes and how depends on whether the plaintiff is considered a public official or public figure, or, alternatively, a private person.

If the plaintiff is a public official or public figure, then, in addition to the common-law elements of defamation, the plaintiff takes on the burden of having to prove two additional elements. That is, on top of the five common-law elements of the prima facie case for defamation, the public-official-or-public-figure plaintiff must add two more elements to have a prima facie case.

Under the first added constitutional element, the public-official/public-figure plaintiff must prove that the allegedly defamatory statement is **false**. Note that under the traditional common law, falsity is not a prima facie element. Instead, truth is an affirmative defense. The constitutionalized form of defamation, however, shifts

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the burden on the truth/falsity issue, making it the plaintiff's job to prove up front.

Second, the public figure or public official plaintiff must prove that the defendant acted with **actual malice** in making the statement. "Actual malice" is a term of art. It does not mean that the plaintiff was somehow "malicious." Instead, the actual malice requirement speaks to the level of care used by the defendant, and it signifies a standard above that of negligence. Actual malice means that the defendant either knew the statement was false, or else acted with reckless disregard for whether the statement was true or not.

If the plaintiff is a private person, but the statement was on a matter of public concern, then the plaintiff is given a little extra flexibility as compared with public figures or public officials. The private-person plaintiff in a constitutionalized defamation case must still prove the falsity of the statement, but as to the other added element, the private-person plaintiff has a choice. The private-person plaintiff can either (1) prove actual malice or (2) prove negligence plus actual injury suffered by the plaintiff.

We can sum this up as blackletter law in this way:

A plaintiff who is **a public official or public figure must, as part of a prima facie case for defamation**, additionally prove: (6) that the statement was false, and (7) that the defendant acted with actual malice.

A plaintiff who is **a private person suing over a statement made regarding a matter of legitimate public concern must, as part of a prima facie case for defamation**, additionally prove: (6) that the statement was false, and (7) either (a) the defendant acted with actual malice, or (b) the defendant was negligent and the plaintiff suffered an actual injury.

The bottom line is that it is very hard to win a lawsuit for defamation if you are a public official or public figure, or if the subject is one of

legitimate public concern. And it's hard because the First Amendment wants it that way.

Here is an example that will show you how these elements work with a set of facts:

***Example: Geopolis Gazette*** – The Geopolis Gazette publishes a story about police corruption that, owing to hasty layout and photo editing, inadvertently implies that Pablo is one of the people discussed in the story who has bribed police officers. Pablo is a dental assistant who has never held public office or been publicly well-known. He has never bribed or attempted to bribe anyone. Because of the newspaper story, Pablo is put on a two-week unpaid suspension at work.

Can Pablo prevail in a defamation case against the Geopolis Gazette? Probably yes.

First let's look at the constitutional analysis. Pablo is not a public figure or public official, but police corruption is clearly a matter of legitimate public concern. Therefore, the First Amendment comes into play. Pablo will be required to prove the falsity of the statement, but he can do this simply by taking the stand and being credible in front of a jury. Next, we look at the actual-malice/negligence issue. The description of the editing as "hasty" suggests the newspaper acted with negligence. Proving actual malice would be more difficult, but happily for Pablo, he will not need to show actual malice. Negligence is enough since Pablo can show actual injury: his unpaid suspension. Thus, Pablo's case survives First Amendment scrutiny.

Now let's look at the remaining common law analysis. Implying that someone has bribed police officers would certainly tend to lower that person's reputation in the community, so it's a defamatory statement. Bribing police officers is a matter of fact, not opinion. And the statement was of and concerning Pablo because the photo in the context of the layout implied that Pablo was one of the bribers. And the statement was published by Geopolis Gazette in its own pages.

All that remains is the “extra element.” This is satisfied three different ways. The communication counts as libel per se, since it was communicated in written form. But, for argument’s sake, even if it were not, the extra requirement would still likely be satisfied because bribery would likely be considered a crime of moral turpitude. And even if we put that aside, Pablo can allege and prove special damages, since he was given an unpaid two-week suspension from work. So, on these facts, Pablo has a strong defamation claim.

The blackletter law of defamation is, admittedly, quite complex. But, as you can see, if you work through it systematically, it’s quite manageable.

**Case: Bindrim v. Mitchell**

This case points up the hazards of ripped-from-the-headlines fiction writing. If you find it surprising, you wouldn’t be alone. When the court issued this decision it sent shockwaves through the book-publishing and novel-writing worlds.

***Bindrim v. Mitchell***

Court of Appeals of California, Second Appellate District, Division  
Four  
April 18, 1979

92 Cal.App.3d 61. PAUL BINDRIM, Plaintiff and Appellant, v. GWEN DAVIS MITCHELL et al., Defendants and Appellants. Civ. No. 52133. Judge Bernard Jefferson wrote a concurrence, not reproduced here.

**Justice ROBERT KINGSLEY:**

This is an appeal taken by Doubleday and Gwen Davis Mitchell from a judgment for damages in favor of plaintiff-respondent Paul Bindrim, Ph.D. The jury returned verdicts on the libel counts against Doubleday and Mitchell. Plaintiff is a licensed clinical psychologist and defendant is an author. Plaintiff used the so-called “Nude Marathon” in group therapy as a means of helping people to shed their psychological inhibitions with the removal of their clothes.

Defendant Mitchell had written a successful best seller in 1969 and had set out to write a novel about women of the leisure class. Mitchell attempted to register in plaintiff's nude therapy but he told her he would not permit her to do so if she was going to write about it in a novel. Plaintiff said she was attending the marathon solely for therapeutic reasons and had no intention of writing about the nude marathon. Plaintiff brought to Mitchell's attention paragraph B of the written contract which reads as follows: "The participant agrees that he will not take photographs, write articles, or in any manner disclose who has attended the workshop or what has transpired. If he fails to do so he releases all parties from this contract, but remains legally liable for damages sustained by the leaders and participants."

Mitchell reassured plaintiff again she would not write about the session, she paid her money and the next day she executed the agreement and attended the nude marathon.

Mitchell entered into a contract with Doubleday two months later and was to receive \$150,000 advance royalties for her novel.

Mitchell met Eleanor Hoover for lunch and said she was worried because she had signed a contract and painted a devastating portrait of Bindrim.

Mitchell told Doubleday executive McCormick that she had attended a marathon session and it was quite a psychological jolt. The novel was published under the name "Touching" and it depicted a nude encounter session in Southern California led by "Dr. Simon Herford."

Plaintiff first saw the book after its publication and his attorneys sent letters to Doubleday and Mitchell. Nine months later the New American Library published the book in paperback.

The parallel between the actual nude marathon sessions and the sessions in the book "Touching" was shown to the jury by

means of the tape recordings Bindrim had taken of the actual sessions.

Plaintiff asserts that he was libeled by the suggestion that he used obscene language which he did not in fact use. Plaintiff also alleges various other libels due to Mitchell's inaccurate portrayal of what actually happened at the marathon. Plaintiff alleges that he was injured in his profession and expert testimony was introduced showing that Mitchell's portrayal of plaintiff was injurious and that plaintiff was identified by certain colleagues as the character in the book, Simon Herford.

## I

Defendants first allege that they were entitled to judgment on the ground that there was no showing of "actual malice" by defendants. As a public figure, plaintiff is precluded from recovering damages for a defamatory falsehood relating to him, unless he proved that the statement was made with "actual malice," that is, that it was made with knowledge that it is false or with reckless disregard of whether it was false or not. (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-280.) The cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Thus, what constitutes actual malice focuses on defendants' attitude toward the truth or falsity of the material published and reckless disregard of the truth or falsity cannot be fully encompassed by one infallible definition but its outer limits must be marked by a case-by-case adjudication.

There is clear and convincing evidence to support the jury's finding that defendant Mitchell entertained actual malice, and that defendant Doubleday had actual malice when it permitted the paperback printing of "Touching," although there was no actual malice on the part of Doubleday in its original printing of the hardback edition.

Evidence establishing a reckless disregard for the truth must be clear and convincing evidence, and proof by a preponderance of evidence is insufficient. (*New York Times Co. v. Sullivan* (1964) *supra.*, 376 U.S. 254, at pp. 285-286.) Whether or not there was such malice is a question of fact to be determined by the trier of fact. However, the reviewing court is required to review the evidence in a libel action by a public figure, to be sure that the principles were constitutionally applied.

Mitchell's reckless disregard for the truth was apparent from her knowledge of the truth of what transpired at the encounter, and the literary portrayals of that encounter. The fact that "Touching" was a novel does not necessarily insulate Mitchell from liability for libel, if all the elements of libel are otherwise present. Since she attended sessions, there can be no suggestion that she did not know the true facts. There is no suggestion that Mitchell was being malicious in the fabrication; her intent may have been to be colorful or dramatic. [Yet because] "actual malice" concentrates solely on defendants' attitude toward the truth or falsity of the material published, and not on malicious motives, certainly defendant Mitchell was in a position to know the truth or falsity of her own material.

## II

[T]he award for punitive damages against Doubleday may stand. A public figure in a defamation case may be awarded punitive damages when there is "actual malice," and, as we have said above, actual malice was established for Doubleday.

## III

Appellants claim that, even if there are untrue statements, there is no showing that plaintiff was identified as the character, Simon Herford, in the novel "Touching."

Appellants allege that plaintiff failed to show he was identifiable as Simon Herford, relying on the fact that the character in "Touching" was described in the book as a "fat

Santa Claus type with long white hair, white sideburns, a cherubic rosy face and rosy forearms” and that Bindrim was clean shaven and had short hair.~ In the case at bar, the only differences between plaintiff and the Herford character in “Touching” were physical appearance and that Herford was a psychiatrist rather than psychologist. Otherwise, the character Simon Herford was very similar to the actual plaintiff. We cannot say~ that no one who knew plaintiff Bindrim could reasonably identify him with the fictional character. Plaintiff was identified as Herford by several witnesses and plaintiff’s own tape recordings of the marathon sessions show that the novel was based substantially on plaintiff’s conduct in the nude marathon.~

#### IV

However, even though there was clear and convincing evidence to support the finding of “actual malice,” and even though there was support for finding that plaintiff is identified as the character in Mitchell’s novel, there still can be no recovery by plaintiff if the statements in “Touching” were not libelous. There can be no libel predicated on an opinion. The publication must contain a false statement of fact.~

It is clear from the transcript of the actual encounter weekend proceeding that some of the incidents portrayed by Mitchell are false: i.e., substantially inaccurate description of what actually happened. It is also clear that some of these portrayals cast plaintiff in a disparaging light since they portray his language and conduct as crude, aggressive, and unprofessional.~

Defendants contend that the fact that the book was labeled as being a “novel” bars any claim that the writer or publisher could be found to have implied that the characters in the book were factual representations not of the fictional characters but of an actual nonfictional person. That contention, thus broadly stated, is unsupported by the cases. The test is whether a reasonable person, reading the book, would understand that

the fictional character therein pictured was, in actual fact, the plaintiff acting as described. (*Middlebrooks v. Curtis Publishing Co.* (4th Cir. 1969) supra., 413 F.2d 141, 143.)~ Whether a reader, identifying plaintiff with the “Dr. Herford” of the book, would regard the passages herein complained of as mere fictional embroidering or as reporting actual language and conduct, was for the jury. Its verdict adverse to the defendants cannot be overturned by this court.

V

~Publication for purposes of defamation is sufficient when the publication is to only one person other than the person defamed. Therefore, it is irrelevant whether all readers realized plaintiff and Herford were identical.~

**Presiding Justice GORDON L. FILES, dissenting:**

This novel, which is presented to its readers as a work of fiction, contains a portrayal of nude encounter therapy, and its tragic effect upon an apparently happy and well-adjusted woman who subjected herself to it. Plaintiff is a practitioner of this kind of therapy. His grievance, as described in his testimony and in his briefs on appeal, is provoked by that institutional criticism.~“The record demonstrates the essential truth of the author’s thesis.~”~

The decision of the majority upholding a substantial award of damages against the author and publisher poses a grave threat to any future work of fiction which explores the effect of techniques claimed to have curative value.

The majority opinion rests upon a number of misconceptions of the record and the law of libel.~

Whether or not an allegedly defamatory communication was made “of and concerning the plaintiff” is an issue involving constitutional rights. (*New York Times v. Sullivan* (1964) 376 U.S. 254, 288; see Rest. 2d Torts, § 580A com. (g).) Criticism of an institution, profession or technique is protected by the First Amendment; and such criticism may not be suppressed merely

because it may reflect adversely upon someone who cherishes the institution or is a part of it.

Defendants' novel describes a fictitious therapist who is conspicuously different from plaintiff in name, physical appearance, age, personality and profession.

Indeed the fictitious Dr. Herford has [none] of the characteristics of plaintiff except that Dr. Herford practices nude encounter therapy. Only three witnesses, other than plaintiff himself, testified that they "recognized" plaintiff as the fictitious Dr. Herford. All three of those witnesses had participated in or observed one of plaintiff's nude marathons. The only characteristic mentioned by any of the three witnesses as identifying plaintiff was the therapy practiced.

Plaintiff was cross-examined in detail about what he saw that identified him in the novel. Every answer he gave on this subject referred to how the fictitious Dr. Herford dealt with his patients.

Plaintiff has no monopoly upon the encounter therapy which he calls "nude marathon." Witnesses testified without contradiction that other professionals use something of this kind. There does not appear to be any reason why anyone could not conduct a "marathon" using the style if not the full substance of plaintiff's practices.

Even if we accept the plaintiff's thesis that criticism of nude encounter therapy may be interpreted as libel of one practitioner, the evidence does not support a finding in favor of plaintiff.

Whether or not a publication to the general public is defamatory is "whether in the mind of the average reader the publication, considered as a whole, could reasonably be considered as defamatory." (*Patton v. Royal Industries, Inc.* (1968) 263 Cal.App.2d 760, 765.

The majority opinion contains this juxtaposition of ideas: "Secondly, defendants' [proposed] instructions that the jury

must find that a substantial segment of the public did, in fact, believe that Dr. Simon Herford was, in fact, Paul Bindrim was properly refused. For the tort of defamation, publication to one other person is sufficient, ante.”

The first sentence refers to the question whether the publication was defamatory of plaintiff. The second refers to whether the defamatory matter was published. The former is an issue in this case. The latter is not. Of course, a publication to one person may constitute actionable libel. But this has no bearing on the principle that the allegedly libelous effect of a publication to the public generally is to be tested by the impression made on the average reader.

*The jury instruction on identification.*

The only instruction given the jury on the issue of identification stated that plaintiff had the burden of proving “That a third person read the statement and reasonably understood the defamatory meaning and that the statement applied to plaintiff.”

That instruction was erroneous and prejudicial in that it only required proof that one “third person” understood the defamatory meaning.

The word “applied” was most unfortunate in the context of this instruction. The novel was about nude encounter therapy. Plaintiff practiced nude encounter therapy. Of course the novel “applied to plaintiff,” particularly insofar as it exposed what may result from such therapy. This instruction invited the jury to find that plaintiff was libeled by criticism of the kind of therapy he practiced. The effect is to mulct the defendants for the exercise of their First Amendment right to comment on the nude marathon.

*Malice.*

The majority opinion adopts the position that actual malice may be inferred from the fact that the book was “false.” That inference is permissible against a defendant who has purported

to state the truth. But when the publication purports to be fiction, it is absurd to infer malice because the fiction is false.

As the majority agrees, a public figure may not recover damages for libel unless “actual malice” is shown. Sufficiency of the evidence on this issue is another constitutional issue. (*St. Amant v. Thompson* (1968) 390 U.S. 727, 730.) Actual malice is a state of mind, even though it often can be proven only by circumstantial evidence. The only apparent purpose of the defendants was to write and publish a novel.~

The majority opinion seems to say malice is proved by Doubleday’s continuing to publish the novel after receiving a letter from an attorney (not plaintiff’s present attorney) which demanded that Doubleday discontinue publication “for the reasons stated in” a letter addressed to Gwen Davis. An examination of the latter demonstrates the fallacy of that inference.

The letter to Davis [Mitchell] asserted that the book violated a confidential relationship, invaded plaintiff’s privacy, libelled him and violated a “common law copyright” by “using the unpublished words” of plaintiff. It added “From your said [television] appearances, as well as from the book, it is unmistakable that the ‘Simon Herford’ mentioned in your book refers to my client.”

The letters did not assert that any statement of purported fact in the book was false. The only allegation of falsity was this: “In these [television] appearances you stated, directly or indirectly, that nude encounter workshops, similar to the one you attended, are harmful. The truth is that those attending my client’s workshops derive substantial benefit from their attendance at such workshops.”

These letters gave Doubleday no factual information which would indicate that the book libelled plaintiff.~

From an analytical standpoint, the chief vice of the majority opinion is that it brands a novel as libelous because it is “false,” i.e., fiction; and infers “actual malice” from the fact that the author and publisher knew it was not a true representation of plaintiff. From a constitutional standpoint the vice is the chilling effect upon the publisher of any novel critical of any occupational practice, inviting litigation on the theory “when you criticize my occupation, you libel me.”

I would reverse the judgment.

### **Questions to Ponder About *Bindrim v. Mitchell***

- A.** Do you agree with the dissent that this decision was bound to have a chilling effect on writers and publishers? Do you think defamation doctrine as applied here impinges on free speech?
- B.** What could Mitchell have done to avoid defamation liability? Could she have written essentially the same book, with just minor changes? Or would she have had to write a substantially different book?
- C.** What did Bindrim do that helped him put together a successful case?
- D.** What have you seen in books, movies, television shows, or other media that appears to have been shaped by concerns about defamation liability?

### **I. Defamation Privileges**

As difficult as it is for a plaintiff to win a prima facie case for defamation, particularly in its constitutionalized form, there are still more hurdles to successfully obtaining a judgment. Defamation defendants have powerful array of affirmative defenses to use.

First, there are **absolute privileges**. An absolute privilege protects anything said in official meetings of the legislature. That includes the floor of Congress or the state assembly chamber, as well as what happens in committee hearings.

Absolute privilege also applies to statements made in the course of court proceedings and in court documents. This makes civil and criminal litigation a huge safe harbor for defamation. This applies to lawyers, judges, jurors, and witnesses. For instance, an attorney could tell the most malicious lies to the judge or jury, and absolutely no defamation liability would result. Of course, such behavior could get a lawyer disbarred. But that is a matter of rules of court and canons of legal ethics – tort law will not enter the fray. Yet once a lawyer steps outside and meets the press on the courthouse steps, the shields are down and defamation liability can attach to whatever is said.

In addition to matters of absolute privilege, there are affirmative defenses that the courts have categorized as **qualified privileges**. The most prominent is probably the “fair reporting privilege,” a common-law doctrine pre-dating *New York Times v. Sullivan* that allows for accurate reporting of defamatory statements made in public records, in the courtroom, or in similar official contexts. The privilege is “qualified” because malice or unfairness on the part of the defendant can cause the privilege to be exceeded. Courts have recognized other qualified privileges as well, including a limited privilege for employers providing references for their former employees.

