Prosecuting a Defamation Case

By William A. Daniels
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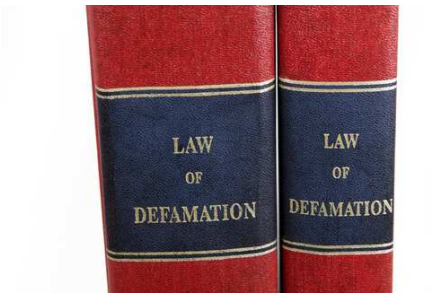
"Good name in man and woman, dear my Lord, Is the immediate jewel of their souls: Who steals my purse steals trash; 'tis something, nothing; "'twas mine, 'tis his, and has been slave to thousands; But he that filches from me my good name Robs me of that which not enriches him, And makes me poor indeed." -Iago, Act I, Scene 3, Othello

Shakespeare's Iago valued his reputation more than gold. Yet we live in a time where powerful media corporations coin gold by trashing the good names of private citizens. Defamation law provides the only defense.



Still, defamation as a practical tort remedy against falsehood in the media is only recently experiencing resurgence after many years of uncertain decline. Actions defending reputation were seriously compromised in 1964, when the U.S. Supreme Court announced in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 686 (1964), that the First Amendment limits a state's authority to award damages for libel. In the wake of that constitutional determination, plaintiffs seeking to recover for defamation shouldered a heavy burden.

The challenges of successfully prosecuting a defamation action in the 1970s and 1980s became so onerous that even conservative courts took notice. The California Supreme Court estimated in the landmark decision Brown v. Kelly Broadcasting Co., 48 Cal.3d 711, 257 Cal.Rptr. 708 (1989), that only about 1% of all liable cases ever made it to trial, while nearly 70% of libel awards granted by juries were subsequently overturned on appeal. "In short, a defamation victim faces almost insurmountable obstacles to recovery within the constitutional limitations. As one plaintiffs' lawyer put it, "It's like going up a greased pole at a 90-degree angle." Id., 48 Cal.3d at 750-751, 257 Cal.Rptr. 708.

Oddly, even as courts grew ever more hostile towards plaintiffs recovering for broken bones or torn flesh, the notion that private citizens should be granted redress when their good names are trampled by the media found favor with conservative courts.

"A reasonable degree of protection for a private individual's reputation is essential to our system of ordered liberty." Brown, 48 Cal.3d at 743, 257 Cal.Rptr. 708. "It is of great importance in a republic, not only to guard against the oppression of its rulers; but to guard one part of the society against the injustice of the other part." 48 Cal.3d at 743, 257 Cal.Rptr. at 708, citing The Federalist No. 51 (J. Madison) (Cooke ed. 1961) p. 351).

Last year, in Khawar v. Globe International, Inc., 19 Cal.4th 254, 79 Cal.Rptr.2d 178 (1998), that pro-citizen trend translated into a boost for reputational law practitioners when the California Supreme Court affirmed a $1,175,000 jury award to a photojournalist who had been falsely identified in a tabloid article as Robert F. Kennedy's assassin. Iago, it seems, can have his day in court.

I. The Reputational Tort

Defamation is an invasion of an individual's interest in his/her reputation. 5 Witkin, Summary of Cal. Law (9th ed. 1988), Torts, § 471, p. 557. The defamation tort may be either libel or slander. Civil Code section 44.

Libel is a false and unprivileged writing or other fixed communication that exposes the subject "to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." 5 Witkin at § 45.

Slander is libel's spoken counterpart and includes radio or television broadcasts. 5 Witkin at § 46. Unprivileged publications actionable as slander include those falsely (1) charging a person with a crime or with having been indicted, convicted or punished for crime; (2) imputing the presence of a contagious, loathsome disease; (3) injuring the reputation of a person in their trade or business; (4) imputing impotence or lack of chastity; or (5) causing actual damage.

The legal concepts of defamation, libel and slander have deep roots in both the English common law and California jurisprudence. Dean Prosser speculates that tort damages first became available in order to provide a legal substitute for dueling when that institution was outlawed. Prosser & Keeton on Torts (5th ed. 1984) Defamation, Ch. 19, § 111, p. 772. Many of the most sensational trials during the pre-revolutionary and early post-revolutionary period of our country's history revolved around "seditious libel," essentially the crime of badmouthing government. Such conduct was punishable by death. See The Trial of Colonel Nicholas Bayard, How.St.Tr.14:471, 502-505, 516 (1702). The defamation statutes set forth in our Civil Code stand essentially unchanged from 1872, when California's statutory law was first codified.

Broadly considered, defamation actions ought to be considered in two categories: character defamation and trade defamation. This article will explore the current state of character defamation law in California, since offense to personal reputation is the type of matter most contingent fee consumer attorneys will encounter in their practice.

Trade defamation protects the reputation of businesses and products. While damages in such cases can run into the millions of dollars, the substantive law in this area is sufficiently unique that its bears examination on its own. See 5 Witkin, Summary of Cal. Law (9th ed. 1988), Torts, § 573, pp. 668-669. For a selection of cases in the trade libel area, see generally, Blatty v. New York Times Co., 42 Cal.3d 1033, 232 Cal.Rptr. 542 (1986); Guess, Inc. v. Superior Court, 176 Cal.App.3d 473, 477-479, 222 Cal.Rptr. 79 (1986); Polygram Records, Inc. v. Superior Court, 170 Cal.App.3d 543, 549, 216 Cal.Rptr. 252 (1985); Nichols v. Great American Insurance Cos., 169

Cal.App.3d 766, 773, 216 Cal.Rptr. 180 (1985), and Erlich v. Etner, 224 Cal.App.2d 69, 36 Cal.Rptr. 256 (1964).

II. Defamation of Character

A. Private versus Public Figure

The first consideration in evaluating a potential defamation action against a media defendant is determining whether the plaintiff is a "private" or "public" figure. The status is critical because of constitutionally protected speech rights and determines what liability standard must be met to confer liability.

Our Supreme Court's recent pronouncement in this area is especially encouraging to defamation victims because it effectively reaffirms the common law notion that media defendants cannot transform an unwilling private citizen into a public figure merely by publishing a story. To understand why Khawar v. Globe International, Inc., 19 Cal.4th 254, 79 Cal.Rptr.2d 178 (1998), is helpful, it is important to understand why the private/public distinction matters.

In defamation actions, private figures generally need only show negligence to recover compensatory damages, including emotional distress, when they are defamed. Brown, 48 Cal.3d at 730, 257 Cal.Rptr. 708. This means that the butcher, baker or auto mechanic usually need only prove a breach of duty-causation-damages case at trial to recover.

This distinguishes private citizens from "public" figures. The latter must establish actual malice (also known as "New York Times malice," for the seminal U.S. Supreme Court decision) by clear and convincing proof in order to prevail when they are defamed. Obviously, that burden is significantly greater than that required of private figures.

Still, even a private figure plaintiff's burden is affected by the content of the offending speech. Where allegedly defamatory matter "involves a matter of public interest," the New York Times malice standard applies. The same standard applies where a private figure seeks to recover presumed or punitive damages. Brown.

First Amendment speech rights are what create these barriers to the plaintiff's case. To understand this, it is necessary to examine the federal constitutional law in this area.

B. The First Amendment Barrier

Strong as our First Amendment rights to freedom of speech and freedom of press stand, like any right they carry with them corresponding responsibility. Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 764, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985).

In a defamation action, the degree of responsibility that a speaker has towards others depends upon whether the target of the speech in question is a public figure or a private citizen. The reason is that the First Amendment, which is made applicable to the States by the

Fourteenth Amendment Near v. Minnesota, 283 U.S. 697, 707, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), is especially protective of speech involving political or public affairs.

In the early 1960's, the U.S. Supreme Court began sharply limiting a State's authority to impose liability for speech in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Addressing whether a public official could recover for defamation, the high court pronounced,

The constitutional guarantees [of freedom of speech and the press] require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not. Id. at 279-280, 84 S.Ct. at 725-726.

The decision was soon recognized as a sharp departure from the common law doctrine. "New York Times has been characterized as "overturning 200 years of libel law"; "almost a transformation" of defamation law; and "revolutionary." Brown, 48 Cal.3d at 747, 257 Cal.Rptr. at 730.

In Curtis Publishing Co. v. Butts, 388 U.S. 130, 134, 87 S.Ct. 1975, 18 L.Ed. 1094 (1967), the court held that the actual malice standard applied to defamation actions brought by public figures as well as public officials. The Supreme Court also explained in Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 789 (1974), that it had imposed the actual malice standard on public figures and public officials both because it presumed they, as a class, enjoy better access to the media than do private citizens, giving them a better opportunity to respond to defamatory statements. The court also assumed that public figures "have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." Gertz, 418 U.S. at 345, 94 S.Ct. 2997.

Even so, the U.S. Supreme Court declined to extend the First Amendment protections applying to speech involving public figures or officials when the same defamatory falsehoods are connected with a private figure.

[The private individual] has not accepted public office or assumed an "influential role in ordering society. . . . He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures: they are more deserving of recovery.
Gertz, 418 U.S. at 345, 94 S.Ct. at 2997 (citations omitted).

Significantly, the U.S. Supreme Court left it to the States to police defamation where it applies to private figures, requiring only that the individual states not impose liability without fault. 418 U.S. at 347, 94 S.Ct. 2997

California and the vast majority of other states have adopted a negligence standard for private figure plaintiffs. Brown, 48 Cal.3d at 740-742, 257 Cal.Rptr. at 727; Khawar, 19 Cal.4th at 274, 79 Cal.Rptr.2d at 190.

C. The Media Cannot Transform Private Figures into Public Figures By Mere Publication

The most recent pronouncement on defamation by the California Supreme Court articulates the rules by which trial courts can determine whether a plaintiff is a private figure, entitled to prosecute under a negligence standard, or a public figure burdened by the New York Times malice standard.

In Khawar, the plaintiff was a freelance photojournalist who was photographed standing hear Robert F. Kennedy minutes prior to the presidential candidate's assassination in 1968. In 1988, a book entitled "The Senator Must Die: The Murder of Robert F. Kennedy" by author Robert Morrow theorized that the Iranian Shah's secret police, SAVAK, working with the American Mafia, killed Kennedy, not convicted assassin Sirhan Sirhan.

In 1989, the Globe tabloid published a story about the Morrow book and included a photo of a group of individuals that had appeared in the book. The image was enlarged and the Globe added an arrow pointing to one of the individuals, identifying him as the assassin.

Plaintiff Khalid Iqbal Khawar was a naturalized United States citizen living quietly as a farmer in Bakersfield when the story appeared. At the time of the assassination he was a working photojournalist covering the Kennedy campaign. The image that the Globe falsely identified as Kennedy's true assassin was his. As a result of the publication, Mr. Khawar became frightened for his own safety and his family's safety. He received threatening telephone calls, he and his children were subjected to death threats and his home and son's car were vandalized. Khawar, 19 Cal. 4th at 259-261, 79 Cal.Rptr.2d at 180-181.

The defendants argued that Khawar was an involuntary public figure, having injected himself in to a public controversy by intentionally allowing himself to be photographed with Robert Kennedy. The California Supreme Court rejected the notion, and focused on Khawar's inability as a private citizen to counter the media's false portrayal.

We find in the record no substantial evidence that Khawar acquired sufficient media access in relation to the controversy surrounding the Kennedy assassination or the Morrow book to effectively counter the falsehoods in the Globe article.
19 Cal.4th at 265, 79 Cal.Rptr.2d at 184.

The holding in Khawar on this point is critical, since it recognizes that media interests often have power far exceeding that of private individuals in shaping public opinion. Defamation law, the California Supreme Court recognized, provides a credible counterbalance to what would otherwise be a free license to exploit.

The holding is also important because it reaffirms the principle that a media defendant cannot transform a private citizen into a public figure merely by publishing a story that draws attention to the individual. The test is the status of the plaintiff at the time the defamation is first published, not afterwards.

D. Privileges Barring Recovery for Defamation

1. The Conditional Privilege

Civil Code section 47 is a haven for defamation defendants in California. Because powerful economic interests find themselves gravely affected by media publication, the statute has been recently amended several times.

On one side of the equation, Hollywood celebrities who find intimate details of their personal lives falsely portrayed in tabloid publications have lobbied the legislature to criminalize defamation. They contend that First Amendment protection and the capability of media enterprises to factor civil liability into the cost of doing business makes the civil remedy inadequate. On the other side of the equation, the media giants have successfully prevented a return to criminal defamation. They may have done the celebrities a favor, because if defamation were to be criminalized, one might expect defamation defendants to avoid discovery in civil actions by simply invoking Fifth Amendment protection against self-incrimination.

Discovery in defamation actions is difficult enough with the "newsman's privilege," a shield that designed to save journalists from having to reveal either news sources or unpublished materials during court proceedings. The privilege applies to all news reporters, be they Los Angeles Times staff writers or tabloid gossip columnists. See, Cal. Const. Art. 1, § 2; Evid. C. § 1070.

2. The Qualified Privilege

Civil Code section 47(c) provides a qualified privilege for communications, without malice, to a person interested in a certain topic by another interested person.

This doctrine provides sanctuary to a broad range of potential defamation defendants. Civil Code section 47(c) provides privilege to a communication made, ". . . without malice, to a person interested therein by one who is also interested, [or] by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or who is requested by the person interested to give the information."

The typical example of circumstances creating this privilege is the job reference scenario. When a prospective employer calls a previous employer for a job reference, if the previous employer's statement to the prospective employer is made without malice, it is privileged.

Even so, the Supreme Court unanimously held in Brown that the qualified privilege of California Civil Code section 47(3) (now section 47(c)), does not immunize the news media from defamation liability to private individuals, even if the subject communications pertain to matters of public interest.

It is important for the plaintiff's counsel to be aware that the vast majority of people looking for a lawyer to represent them in a defamation action present factual circumstances to which the "common interest" privilege will apply. For example, a businessperson who loses a license or an important segment of business because of an allegedly defamatory complaint to a governmental authority. When deciding whether or not to take on a case, consult Civil Code section 47 and its annotations.

3. The Judicial Privilege

In Shahvar v. Superior Court, 25 Cal.App.4th 653, 30 Cal.Rptr.2d 597 (1994), the court of appeal held that the transmission of a facsimile copy of a complaint was not privileged under Civil Code section 47(b). The attorney defendant in Shahvar had faxed a copy of a complaint to the news media the day before he filed it. The Court correctly held that such conduct fell outside of the qualified judicial privilege. But the decision caused an uproar in the media, and the legislature amended the section by adding subparagraph (d) which extends the privilege to a ". . . fair and true report in, or a communication to, a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof . . . ."

This amendment provides a troubling expansion of the privilege, giving attorneys, politicians and the media free reign to immunize themselves by simply filing (even subsequent to the defamation) an "official proceeding" which restates the defamatory statement.

In effect, the privilege provides a legal means to end run the common law principle that "one who republishes a defamatory statement is deemed . . . to have adopted it and so may be held liable, together with the person who originated the statement, for resulting injury to the reputation of the defamation victim." Khawar, 19 Cal.4th at 268, 79 Cal.Rptr.2d 178.

III. Practice Pitfalls

A. Civil Code section 48a Requires a Retraction Demand or Damages are Limited.

Where the libel is published in a newspaper or a slander broadcast by radio or television, Civil Code section 48a limits a defamation action to "no more than special damages unless a correction be demanded . . . within twenty days after knowledge of the publication or broadcast . . . ."

The retraction request should be personally served or sent by some means allowing the practitioner to verify service within the specified time limit. If the media outlet declines to publish a retraction three weeks of service, then the plaintiff is free to seek "general, special and exemplary damages" in a civil action.

B. Summary Judgment

Where First Amendment interests are implicated (arguably, this occurs in every defamation case), summary judgment is considered to be an "approved" procedure for disposition. Wasser v. San Diego Union, 191 Cal.App.3d 1455, 1461, 236 Cal.Rptr. 772 (1987). This description is to be distinguished from the typical characterization of summary judgment proceedings as a "drastic remedy." Defendants invariably rely upon Wasser and related cases to represent that summary judgment is a "favored remedy," but this is not a correct statement of the law.

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William A. Daniels is a Trial Attorney with BILL DANIELS | LAW OFFICES, APC, in Encino, CA. His practice focuses on class actions, employment and serious personal injury cases. A graduate of Loyola Law School of Los Angeles, he is a member of the Consumer Attorney Association of Los Angeles Board of governors and a founding member of the Civil Justice Program and the 21st Century Trial School at Loyola. For several consecutive years he has been names a "Super Lawyer" Los Angeles Magazine in Southern California.
He can be reached at William.Daniels@BillDanielsLaw.com www.BillDanielsLaw.com