

CASE STUDY: SOIL SOWED FOR BATTLE: GETTYSBURG THE STATE OF CYBER COMMUNICATION LAWS

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ABSTRACT

This paper will create a historical overview of libel cases, and create a defense framework for Marilyn Phillips, a disabled professor and activist, libeled by defamatory statements in a Gettysburg, Pennsylvania BoroughVENT.com blog site. The paper's aim is to understand how libel per se law does not stop at traditional publication domains, but are a new frontier in computer information science publishing. With the onset of computer and Internet publishing, libel per se and libel per quod laws will evolve to include cyber domains.

Keywords: Cyberlaw, Law, Libel Per Se, Libel Per Quod, Internet, Security, Defamation, Blog

INTRODUCTION

On July 1, 1863 the first shots of an uncivil war rang out during a collision of Union and Confederate soldiers in Spangler's family farm's golden-wheat fields at Gettysburg, Pennsylvania. Three days later, in a valley between Devil's Den and Little Round Top, Plum Creek's water flowed red and some 7,500 men lay dead. Justice, honor, and equality were at stake.

Some 150-years later, war is about to break out again on this sacred soil. Today, in September of 2014, a metaphoric disabled soldier continues to defend her honor on this consecrated American ground. Seeking not to rekindle the controversy for injustice against slaves of color, but slaves of inequality. The evil she pairs off against is not a ghost from Gen. Robert E. Lee's gray Calvary, but a human enabled digital transit that welds defamation, false light, and libelous contempt at light speed: the Gettysburg's town council's blog spot at BouroughVENT.com.

This paper will first frame the legal presidencies on libel and slander causation. Secondly, the study will structure a historical outline of mass media libel transmission cases: slander, newspapers, wire service, and broadcast. And finally, the research will demonstrate how Marilyn Phillips, a disabled professor and activist, has suffered defamation of character and libel at the hands of the mass media's newest transit: the broadband blogging dissemination on the Internet.

Research Question:

1. Has the proliferation of computer technologies and a gap in cyber law allowed individuals to escape traditional libel per se punishment in written communications?

REVIEW OF LITERATURE IN COMMUNICATIONS AND CYBER LAW

Causation of Slander and Libel Torts: Civil and Criminal

In history, humans have always found a method to communicate. Cave drawings and smoke signals maybe the first form of historical communication whereby someone could have been defamed. Defamation is an attempt by one party to expose another party to "public hatred, shame, contempt, or disgrace, or to induce evil opinion of one in the minds of right-thinking persons and to deprive one of their confidence" (Carter, Dee, & Zuckman, 2008, p. 46). In *Rosenblatt v. Baer* (1966), Justice Stewart said in his opinion that every "human" has the right to "protect of his own reputation from unjustified invasion and wrongful hurt" (Carter et al., 2008, p. 46).

In slander and libel cases, whereby criminal or civil, there are three common frameworks: a defendant created a defamatory statement to a living subject or organization, publication of the statement was heard by at least one person, and a plaintiff can be identified directly or indirectly through associations. The context or association of the communication must be false in statement and need not be “impropriety or immoral in behavior.” The action can be insinuating a false directive in which one person causes another persons to consider the defendant in false light such as in the case of *Braun v. Armour & Co.* (1930) where a kosher butcher was said to be selling pork (Carter et al., 2008, pp. 48–49). In addition, libel cases have been instigated from an act of false stating of ones sexuality or by omitting facts that directly relate to creating a holistic and truthful statement about a person. In two cases, *Mohr v. Grant* (2005) and *Janklow v. Newsweek* (1985) the U.S. Supreme court did not directly rule in favor or against a “libel-by-omission claim” (Carter et al., 2008, pp. 50–51).

Historical Literature Overview of Slander and Libel in the Mass Media

In 1348, the Office of the Justice of the Peace was created to carry out discipline in England for the Crown. The peace officers’ goal was to suppress slanderous statements or songs chimed by villains, pheasants, craftsmen, fishmongers, and Robin Hood do-gooders, against King Richard II (Reilly, n.d., pp. 118–120). Sheriffs carried out the King’s writs to bring those that sang slanderous political songs in the countryside:

To seek silver to the King, I my seed sold; wherefore my land lieth
fallow and learneth to sleep. Since they fetched my fair cattle
in my fold; when I think of my old wealth, well nigh I weep. Thus
breedeth many beggars bold; and there wakeneth in the world
dismay and woe, for as good is death anon as so for to toil. (p. 120).

Slander may have started in the fields and countryside’s of France and England. When peasants were plundered for taxation and exiled from the towns because of royal’s fears of the Black Plagues’ spread. Slander’s formation was then generated in the folk songs, which spread the word of the commoner and craftsmen, and shed negative light on the Crown. The songs and statements mocked their dignity and struck pointed jabs at their royal pride.

Years later in the newly formed colonies, the Penny Presses hailed as the people’s new voice. And inside this voice generated the first strikes of yellow journalism and libel-lashing literature. Edwin Lawrence Godkin, an editor for the *Nation*, criticized the practices of journalists as cheap newspapers tactics and libelous concoctions, “muckraking and scandal-mongering” (Coyle, 2014, p. 261). Godkin called for action to stop and shutdown the inexpensive newspapers that were “failing in their duty to mold public opinion and cultivate society” (Coyle, 2014, p. 261).

In 1890 the *Harvard Law Review* published an article by Samuel Warren and Louis Brandeis framing a response to Godkin’s call to honor. The article created a model for privacy law, which sought to “protect Americans against the invasive practices of newspaper journalists” (Coyle, 2014, p. 263). Countering their clam was infamous support of journalism and newspaper penny-press publisher Horace Greeley. Greeley, and his two papers the *New-Yorker* and *New-York Tribune*, laid pre-civil war landmark cases supporting freedom of the press and opposing libel legislation. Although Greeley was said to have conspired with then President Abraham Lincoln to print libelous remarks against Southern land owners and Confederate troops for Civil War strategic information and planning, Greeley “viewed the law of libel as an affront to the First Amendment assurances of a free press, referring to libel suits as “annoyances” and “infestations” upon his career as a journalist” (Stewart, 2012, p. 67). Greeley cited period case that framed U.S. Senate Democrat Charles King as a co-conspirator to “combine electoral votes” in the House of Representatives and Senate naming John Quincy Adams as then president (p. 67).

During the presidential election controversy in 1824, Root attempted to break up a joint meeting of the House and Senate that would invalidate the plan to combine electoral votes in a way that would name John Quincy Adams president. King chastised Root in the pages of the *American*, after which Root sued and won a \$1,400 verdict before a Democratic-leaning judge. Greeley called this a “most unjust verdict, which, if sustained, left the press no substantial liberty to rebuke wrong-doing or chastise offenders. (p. 67).

Although Greely and Cooper sparred many of times over the years in separate libel cases, one such case brought slander into the courtroom and set off a series of verbal fisticuffs between the entrepreneurs. Cooper, a writer and author of “The Last of the Mohicans,” called Greely in open court an “unhandsome” man during the trial. The remark, overheard by sitting jury and justice, set off a domino-toppling process of suit-and-counter slander suit (Stewart, 2012, p. 69).

Mark Twain, an author and newspaper correspondent, wrote in 1886 a series of travel vignettes for the San Francisco *the Alta.*, which could have created the first existence of trade-mark torts legislation and wire service libel. Twain, a master wordsmith, utilized a “mocking but conversational style” to create a mood in newspaper readership that the city of Manhattan is “overcrowding,” and a not sought after travel destination (Epstein, 2012, p. 21). The regards, a subtle yet crafty methodology for steering tourism Westward, could have become a libelous tort of omission to truth. His indifference to the city furthered through citations of it having “uncomfortable stagecoaches; the police force visible all along Broadway directing traffic and escorting women; and the fact that it was a day’s journey to traverse Manhattan Island” (p. 21). Although the city of Manhattan never sought retribution against the famous author, the case could have been cited as a first tort in omission of facts and a libel case brought about from an organization or corporation through telegraph wire transmission.

Literature Background on the Libel Case

A polio victim and disabled Morgan State University professor turn activist first launched her crusade for acceptance and equality in 1987 by filing a complaint against her own employer. Marilynn Phillips suffers from osteoporosis, uses a wheelchair because of post-polio syndrome. Phillips launched a tort against university because of her inability to utilize the campus’ restrooms that were not compliant with the American Disability Act (Ridgerunner, 2009). American Disability Act (1990) protects the rights of disabled person in the workplace and public common areas:

Prohibits discrimination and ensures equal opportunity for persons with disabilities in employment, State and local government services, public accommodations, commercial facilities, and transportation (ADA.Gov, 1990).

Empowered by her successful campaign, Phillips sparred off with Maryland State Arts Council. The Maryland State Arts Council lost its funding by the National Endowment for the Arts until it too became compliant with the ADA’s policies on restrooms’ accessibility for disabled persons. After years of battling Maryland’s airport and shopping establishments for equality, Phillips took her campaign onto National Park Service’s hallowed ground. In 2006, Phillips filed suite against Gettysburg College’s Majestic Theater. The theater, a public facility privately owned by the college, concerned Phillips because of lack of emergency exits and handicapped accommodations. College administration came into compliance after Phillips’ case was brought to light.

With first blood drawn again on the historical battlefield 150-years later, Phillips went after Gettysburg’s entrepreneurs, restaurants, and bed and breakfast businesses. Her first suits captured the needs for the small national landmark town to become complaint for all of its disabled tourism guests. Phillips filed suit against three establishments: Codori House of Gifts, Wentz Stained Glass Studio, and the Spirited Ladies Shoppe (Digital Media Law Project, 2008; James, 2009; Ridgerunner, 2009).

With tension and frustration brewing in the Civil War town, Phillips launched her largest battle against the newly constructed Gettysburg tourism site. The activist alleged the federally constructed National Park site failed to appropriately accommodate the needs of disabled tourist visiting the lecture hall’s government welcome center in 2009 (Digital Media Law Project, 2008).

RESULTS AND DISCUSSION

Framing Marilyn Phillip's Libel Case

In today's society, speed is everything. Digital natives and digital immigrants, a coined terminology from Marc Prensky (2001) describes youth and persons born into the technologically enhanced world. Prensky describes digital immigrants as persons that lived in an area where telephones once had cords (Prensky, 2001). Conversely, digital natives, those born in a cordless telephone world, utilize every means possible to communicate information through cyber or Internet endeavors and Smartphone technologies (Tapscott, 1999). The technology utilization can be positive or negative in its capabilities. The technology itself is another form in which individuals or the mass media can find transit for messages, collaboration, and information. Likewise, the actions of the controlling individuals can be accessed as enlightening or sinister.

In cases across the globe, digital natives and digital immigrants have both gone foul with technology. Cyberbullying, a measure to criminally stalk and cause psychological harm through Internet social sites and methodologies, has become prolific in hybrid environments (Palfrey & Gasser, 2010, pp. 85–86). Here within the sinister Internet bound transmissions lies the foundation of Phillips v. BoroughVENT.com.

In defamation cases elements of criminal or civil sedition in nature are needed to provide evidence there is a defamatory or false statement, publication, and identification of the plaintiff (Carter et al., 2008, pp. 47–51). In the case of Marilyn Phillips, a borough Internet blogger site called, "www.BoroughVENT.com" that was run by Deborah Golden, Phillips has been named directly in the communications. The Internet based social forum has been utilized as transmission model for positive and negative topical discussions in and around the Gettysburg and monitored by town council affiliates. On the public Internet forum, Gettysburg community parties published spirited thoughts and regards to current town happenings. On one such thread of banter, Deborah Golden and other co-conspirators insulted, hurt, and made sexual references and metaphoric written bodily threats against the person and reputation of the plaintiff, which set up the groundwork methodology and framework in Phillips' defamation of character libel per se case.

Phillips cited published Internet statements as a violation of the Pennsylvania Human Relations Act, whereby "Respondent used unreasonable profanity in verbal assaults against Complainants" and that "Respondent referred to Complainant Phillips in sexual, scatological, sexist and disability-bigoted language" in violation of sections 5(d) and (e) of the PHRA" (Digital Media Law Project, 2008). With clear evidence of publication and actual malice, Phillips' case demonstrated multiple users defaming her by their false claims. The defendants ridiculed Phillips' prior actions against Gettysburg's businesses and the National Park Service's facility. Phillip's torts against the facilities for non-compliance with the American Disability Act where scolded in the blog publications as a methodology for her to "extort" money and commit "terroristic" actions against the hollowed national park and town business owners (Digital Media Law Project, 2008). In addition, the blogspot created a viral threat, and physical threat against Phillips and her husband that demonstrated actual malice:

Beware shop owners, the Bitch on Wheels ... who sues people to have handicap ramps, has hit three stores today... This woman's extortion ends NOW! (Digital Media Law Project, 2008).

SUMMARY

A Measure of Fact and Prof for the Plaintiffs'

The single publication rule demonstrated a tort merit from the directed written and published identification of Marilyn Phillips and her husband. Secondly, actual malice and contempt causes were merited and supported in the

libel per se case. Presiding cases such *Peck v. Tribune Co.* (1909) laid a casual claim for the plaintiff. In the case, the defendant (BoroughVENT.com) knowingly published the libelous statements and attacks on Phillips character with “intended defamatory attacks,” thus the publisher “published at his own peril” (Carter et al., 2008, p. 63).

Although Phillips is a qualified vortex public figure, one that thrusts themselves into the public spotlight taking on a position of limited power and presence while speaking out for a group or cause, published threats of verbal and physical assault sandwiched her protection under presiding law of *Troy v. Cochran* (2005), (Carter et al., 2008, p. 67). The presiding law acts as a method to run an “injunction to restrain defamatory speech,” (p. 67). Furthermore, the libel per se speech was purposeful in nature and proves actual malice when the publication purpose was “other than to inform those who have a ‘need to know’,” ... and the “publication is not the proper one of informing the public” under a “fair and accurate account” (Carter et al., 2008, p. 77).

As a last defense for Phillips, *United States v. Alkhabaz* (1997) the courts recognized any transmission of threat offers a plaintiff protection from an “unconditional and specific expressions of intention [sic] immediately to inflict injury remove [sic] person from the Protection of the First Amendment” (Carter et al., 2008, p. 654). A True threat is described as a “statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault” (p. 653).

In addition, *Lunney V. Prodigy Services* (1998) saw that a provider of bulletin boards must exercise a methodology of “editorial control” (p. 655). With BoroughVENT.com exercising no editorial control and condoned the harmful and expressions of violent intent from users, the defendant non-liability claim is inconsistent with the truth. The acceptance of the posted facts, and agreement reflections from the editors in the blogger site publications, is a clear causation and knowledge of causation by the defendant. The knowledge and lack of control by BoroughVENT.com can be deemed as understood acceptance of the practice and conditional knowledge of the statements causing harm and threat.

CONCLUSION AND FUTURE OF INTERNET LIBEL CASES

Although Internet slander and libel cases are still in its infancy setting in the courts, cases like *Blumenthal v. Drudge* (1998) have placed merit for activists and public people to take sanctuary. In the past, the courts have found that speech in cases like *NAACP v. Claiborne Hardware* (1982) was protected. But here, in the *Phillips v. BoroughVENT.com* case, serious threat and sexual discrimination have not been met as rhetorical hyperbole or exaggerations to merit a defense of fair comment. Additionally, the known editor of the BoroughVENT.com blogger spot can be found in knowledge of the contempt statements through her won recognition and expressed published agreement of the said libel per se commentary. With acknowledge acceptance and published agreement, BoroughVENT.com falls prey to the presiding judgment in *Harte Hanks Communication, Inc. v. Connaughton* (1989).

Interestingly as legal cases catch up with innovations in computer communication technologies, society is witnessing cases whereby the courts are no longer allowing libel per se issues to continue in Internet cases where publishers are not clearly defined or traditional corporation owned. As an example, in March of 2014 The Sydney morning Herald reported on a case where judge Michael Elkaim ruled that a former Orange High School student Andrew Farley “should pay compensatory and aggravated damages for making false allegations about a music teach Christine Mickle” (The Sydney Morning Herald, 2014). The student’s defamatory Tweet was cast on a mobile device and “grapevined” to peers. The defamatory health issue statements caused actual mental health issues forcing the teacher to take leave from the position and seek aid. Because of the libel per se defamatory comments, Judge Elkaim awarded order Farley to pay \$85,000 in compensatory damages and an additional \$20,000 in aggravated damages. The judge ruled his defense had “no substance” to merit truth and did have publication worthy cause through the Tweet publication (Whitbourn, 2014).

Interestingly an early case in Florida set preceding law for Judge Elkaim whereby Carey Bock, of Mandeville, La., was charged with libel per se defamation of charter. Bock’s downfall was publishing on a known Internet site Fornits.com negative comments about Scheff’s consultant organization (Parents Universal Resource Experts), aids parents in working with troubled teens and boarding schools. The publication, which published on a forum style site,

created defamatory and negative connotations about Scheff and her business causing monetary losses and personal damages. Scheff was awarded over \$11 million in damages (Parker, 2006).

In the most recent case history, June 6, 2014, University of Ottawa Law Professor Joanne St. Lewis was found libeled by peer Denis Rancourt in two 2011 blog references (National Post, 2014). A six-person jury awarded St. Lewis \$350,000 in damages. The case sets a new presidency for libel suites through blog spot posting and Internet transmission publications and further offers evidentiary proof in the Phillips v. BoroughVENT.com case. In 2009, the Pennsylvania Human Relations Commission has recommended a "no probable cause" finding in the case Phillips v. BoroughVENT.com case (James, 2009b). With the case still having merit and validity, and new case law now setting a presidency, Rancourt v. Lewis (2014) will help establish a solid defense for plaintiff Phillips' and her husband in the 2008 case that is still pending and in motion. With the affirmation of Joanne St. Lewis's case, the Canadian presiding judge said,

The ease with which information can be published on the Internet might lead some to think there are no restrictions, but writing something in a blog is no different than printing it in a newspaper or broadcasting it on TV. It is still publishing and is subject to the pertinent laws.

Freedom of expression does not include the freedom to publish information that will interfere with the judicial process or endanger people's well-being, privacy or reputations. Libel on the Internet is still libel. The ease of cut-and-paste does not override copyrights.

The Internet has vastly expanded the scope for freedom of expression, but the technical ease of that expression has not erased the responsibility to be truthful, ethical and law-abiding. (Times Colonist, 2014).

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