

Defamation: Judicial Scrutiny of a Sport Plaintiff's Rights

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The tort of defamation, dating back to early 16th century common law, provides recourse for false, insidious or irresponsible statements which damage individual reputations. A defamatory statement harms the reputation of an individual and jeopardizes standing within the community or among a local constituency. The tort of defamation includes both slander and libel. Defamatory comments made orally, such as those heard on television, refer to slander. Comments are slanderous *per se* if they fall in to one of the following categories:

1. Accuses the plaintiff of criminal conduct;
2. Accuses the plaintiff of having a loathsome disease;
3. Accuses the plaintiff of being unchaste;
4. Accuses the plaintiff of misconduct in public office; or
5. Injure's the plaintiff's profession, business, or trade.

For example, false comments accusing someone of murder, having AIDS, having sex with an entire basketball team, or illegal recruiting practices could be construed as slanderous *per se* (Carpenter, 1995). Libel is a broader category of communication. Materials in newspapers and in other written documents (e.g., written comments, photographs, cartoons) constitute libel. Some states classify statements as libel *per se* if they fall into one of the above five categories characterizing slander *per se*. Otherwise, the libel is libel *per quod* and plaintiffs must prove the defamatory meaning and damages.

Slander and libel were originally recognized as two distinct types of defamation. Libel was thought to be more damaging as the material containing the libelous statement had greater longevity (Maraghy, 1985). For example, news-

papers and magazines could be retained for weeks while statements made on television vanished within seconds. Technology now secures media statements in a tangible form and most jurisdictions refer to the two terms (i.e., slander and libel) interchangeably (Pember, 1990).

A plaintiff alleging defamation must prove the following four elements: (a) a false statement, (b) publication to a third party, (c) fault or negligence of the publisher, and (d) damage (Restatement of Torts § 558-559). Plaintiffs alleging slander (or libel) *per se* have an advantage as they are not required to prove damages, often times "the most difficult element of defamation to prove" (Carpenter, 1995, p. 53).

The judicial system attempts to balance the competing rights of plaintiffs and defendants.

U.S Supreme Court Justice Stewart elaborated on the importance of defamation law to an individual in the 1966 plurality decision of *Rosenblatt v. Baer*. As explained by Justice Stewart (1966, p. 92),

The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty.

Defamation law supports society's interests in the protection of individual character and reputation.

On the other hand, critics of defamation law argue that the privilege doctrine protects speech regarding matters of public and social interest. According to the critics, American democracy is founded on the concept that individual commentary contributes to the "market-

place of ideas" (*Curtis Publishing Co. v. Butts*, 1967; *Garrison v. Louisiana*, 1964; *New York Times Co. v. Sullivan*, 1964). Defamation law stifles the expression of those comments necessary to expand the thought processes of individual citizens. The resulting censorship of ideas stifles American progress and the right of the individual citizen to lobby for an "improved" environment.

To retain the sanctity of freedom of speech while at the same time protecting the rights of individual citizens, the Supreme Court has categorized individuals into four groups: public officials, public figures, limited purpose public figures, and private figures. The burden of proof differs among the categories and hence, varies the "accuracy" required of defendants. Part I of this paper elaborates on the rationale behind the various plaintiff classifications. Part II elaborates on how the courts distinguish between statements of fact and opinion. Part III briefly reviews various defenses. Part IV justifies the absence of legal protection given to a sport figure's individual reputation while the argument that sport-related figures should be given the same amount of protection as others is presented in Part V. Part VI offers some concluding comments.

Part I(a): The Public Official

The 1964 Supreme Court decision in *NY Times v. Sullivan* revolutionized the way the judiciary interpreted and applied defamation law. "This is one of the most important First Amendment cases ever decided" states Pember (1990, p. 129).

In the *NY Times* case (1964), the Supreme Court prohibited *public officials* from recovering damages for defamatory comments relating to official conduct unless the plaintiff could prove that the statement was made with *actual malice*. The Supreme Court believed the public had a right to know and to evaluate for themselves, how leaders governed. Further, open debate, although at times caustic and unpleasant, assured the exchange of ideas necessary to bring about political and social change desired by the people.

Pember succinctly defines a public official as "someone who works for a government and

draws a salary from the public payroll" (1990, p.133). The Supreme Court also attempted to define the public official. In *Rosenblatt v. Baer* (1966) the Court questioned whether *all* individuals employed by the state are public officials or just those employed in "high powered" positions. As concluded by the Court (1966, p. 85),

It is clear, therefore, that the "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. (emphasis added)

As stated by Justice Douglas, in a concurring opinion, "anyone on the public payroll" qualifies as a public official (*Rosenblatt v. Baer*, 1966, p. 89).

In *Johnston v. Corinthian Television Corporation*, 1978, the Supreme Court of Oklahoma held that a sixth grade wrestling coach, coaching on a *volunteer* basis, qualified as a public person due to the interest the teacher generated in the sixth grade wrestling program and his physical education classes. Coaches and teachers employed by public institutions and park and recreation employees (part-time and full-time) and volunteers, regardless of their national status or degree of prestige, are consistently held as public officials who must prove actual malice to recover for defamatory communications.

Communication made with actual malice was defined by the *NY Times* Court (1964, p. 380) as communication made, "with knowledge that it was false or with reckless disregard of whether it was false or not." Proof of actual malice represents a significant departure from early defamation law. Prior to the *NY Times* case, defamation was "recognized as a strict liability tort," or a tort for which there was absolute liability regardless of fault (Ransom, 1995, p. 392). Proof of negligence was not required. Subsequent Supreme Court cases provide evidence of the obscurity associated with proving actual malice. For example, the Supreme Court held that statements made out of hatred do not constitute actual malice (*Garrison v. Louisiana*, 1964). Further, the Supreme Court concluded that ac-

tual malice cannot be inferred due to careless or unprofessional investigative practices (*St. Armant v. Thompson*, 1968). As explained by the Supreme Court in *St. Armant v. Thompson* (1968, p.727),

There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts show reckless disregard for truth or falsity and demonstrated actual malice.

The plaintiff's ability to prove actual malice remains difficult.

Part I(b): The Public Figure

In a subsequent landmark case, *Curtis Publishing Co. v. Butts* (1967), the Supreme Court extended the constitutional protection given to statements about public officials in the *New York Times* case (1964) to *public figures* as well. In the *Curtis* case (1967), an article was published suggesting that Wally Butts, the Athletic Director at the University of Georgia, conspired to "fix" a football game between the University of Georgia and the University of Alabama. Butts was employed by the Georgia Athletic Association, a private institution, and did not qualify as a public official. Similar to the standard of proof established in the *New York Times* case (1964), the *Curtis* Court (1967) stated that individuals falling into the status of a public figure must prove actual malice to recover for damages. As explained by the Supreme Court in *Curtis Publishing Co. v. Butts*, a public figure is an individual who has, because of his or her activities, "commanded sufficient continuing public interest" (1967, p. 155). Subsequent court decisions adopted and extended the Supreme Court ruling. As explained in a footnote in *Waldbaum v. Fairchild Publications, Inc.* (1980, p. 1294), public figures include,

Many well-known athletes, entertainers, and other personages endorse commercial products, . . . This phenomenon, regardless of whether it is justified, indicates that famous persons may be able to transfer their recognition and influence from one field to another.

Similar to politicians, the communications from and actions of athletes, for example, can sway individual thinking. Consequently, their individual actions should be open to public debate and scrutiny.

The 1967 *Curtis* Court provided two reasons for its extension of the actual malice standard as defined in the 1964 *NY Times* case to public figures. First, the plaintiff-public figure voluntarily "thrusts" himself or herself into the "vortex" of "important public controversies" (*Curtis*, 1966). As explained by the United States District Court in *Chuy v. Philadelphia Eagles Football Club* (1979, p. 267),

We obviously cannot say that the public's interest in professional football is important to the commonwealth or to the operation of a democratic society in the same sense as are political and ideological matters. However, the fabric of our society is rich and variegated. As is demonstrated by the Nielsen ratings, the American public is fascinated by professional sports. . . . If society chooses to direct massive public attention to a particular sphere of activity, those who enter that sphere inviting such attention must overcome the *Times* standard.

Second, the 1966 *Curtis* Court rationalized that, similar to public officials, public figures had ". . . sufficient access to the means of counter argument. . . ." via the media.

Part I(c): The Limited Purpose Public Person

The 1974 Supreme Court decision in *Gertz v. Robert Welch, Inc.* further influenced the interpretation of defamation law. The *Gertz* Court (1974) introduced the *limited purpose public person*, a distinction from the *general all-purposes public person* adopted by the Supreme Court in *Curtis Publishing v. Butts* in 1967. A general all-purpose public figure represents an individual generating (a) instant *national* recognition and (b) constant, *national* media coverage. In comparison, the limited purpose public figure generates (a) instant *local* recognition and (b) constant *local* media coverage. The courts further assert that *total* community recognition need not

be present to qualify as a limited purpose public figure. Rather, it is sufficient if the particular subculture of which the individual is involved is exposed to the defamatory publication (*Rosenblatt v. Baer*, 1966; *Scott v. News-Herald*, 1987; *Washington v. Smith*, 1995). As explained by the Supreme Court in *Gertz v. Robert Welch, Inc.* (1974, p. 351),

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

Very few individuals fall into the all-purpose public figure category. Those with instant national recognition and constant media exposure characterize the all purpose public figure (Barron and Dienes, 1979). Entertainers Johnny Carson and Wayne Newton are all-purpose public figures as is William F. Buckley, the conservative political writer (Pember, 1990). Sports figures like O.J. Simpson, Marge Schott, and Michael Jordon would likely be considered all purpose public figures as well.

The subject matter regarding legal and appropriate comments differ between the public person and the limited purpose public person. Individuals discussing general purpose public persons can freely comment on both personal and professional aspects of the individual. Individuals discussing limited purpose public figures, however, can comment only on individual actions which contributed to the public's interest. For example, players, coaches and other sport-figures must accept comments, although disparaging, regarding sport-related issues (e.g., performance, strategy). Similar to the general purpose public figure, individuals alleging defamation would have to prove actual malice. However, comments regarding non-sport related issues would be classified as "private." As explained by Maraghy (1985, p. 68),

Particularly in the area of sport, there are many personal factors in an athlete's life

which may affect his career but which may not be the proper subject of unlimited publication.

Individuals alleging defamation regarding the communication of these private, non-sport related issues would only be required to prove negligence as a private figure (see below).

Part I(d): The Private Figure

The "private figure" classification refers to individual citizens not involved in public issues or employed as a public official. Distinguishing between a public versus private figure is a critical issue for a plaintiff. Classification as a private person is important as private figures need only prove that an alleged defamatory statement was negligently made. Negligence refers to the failure to exercise "reasonable care." This represents a much lower standard of proof than that required for public officials, public figures, or limited public purpose figures.

The difficulty comes in ascertaining who qualifies as a "private figure." Defendants allege that any private citizen involved in a matter of interest to the public constitutes a limited public figure, at minimum, and is subject to the grueling standard of proof required by the *NY Times* case (1964). According to the Supreme Court's plurality decision in *Rosenbloom v. Metromedia, Inc.* (1971), all publication regarding matters of general interest or public concern should be protected by requiring plaintiffs to prove actual malice. According to this "subject matter" classification, an individual's intrigue and related comment regarding another persons calamity or privacy would be "protected" if of interest to a particular constituency. Understandably, this could result in a "tabloid" approach to the news and reporting while simultaneously defaming a large number of private citizens. However, courts have repudiated the "public interest" or "subject matter" standard established in the 1971 *Rosenbloom* case.

Two dominant reasons explain why the Court preserved the private person status granting individuals a lower standard of proof. First, it is assumed that private individuals do not have the same ability to access the media as public officials and public figures. Access to the media

provides public officials and public figures with an opportunity to refute defamatory statements. The value of media access is illustrated by the Iowa Libel Research Project. According to this research project, almost 75% of defamed plaintiffs indicated they would have found adequate recourse if "the news medium would have published or broadcast a correction, retraction or apology" (Pember, 1990). Second, courts agree that public officials, public figures, and limited purpose public figures relinquish rights when they voluntarily become entangled in an issue of public concern. Private individuals, in comparison, are not attempting to influence society and are not desirous of media attention (*From v. Tallahassee Democrat, Inc.*, 1981; *Wheeler v. Green*, 1979).

Private persons still fight an uphill battle when attempting to obtain monetary damages. Private persons can recover for defamation based upon ordinary negligence only when proving actual injury. As defined by the Supreme Court in *Gertz* (1974, p. 350), actual injury includes, Impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.

Actual injury is difficult to prove. Plaintiffs seeking monetary relief must prove actual malice to recover presumed or punitive damages. Since defamation cases historically last over a decade, it is often not financially feasible for the plaintiff to pursue the case unless punitive damages are sought as the recovered damages are not enough to offset litigation expenses. Litigation time and expense, when combined with the need to prove actual malice, places the private individual plaintiff at a distinct disadvantage.

Part II: Fact v. Opinion

Early common law protected statements of opinion from defamatory allegations. The Supreme Court affirmed this sentiment in the *Gertz* case in 1974. As stated by the Supreme Court (*Gertz*, 1974, p. 339),

Under the First amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges

and juries but on the competition of other ideas.

However, statements based upon false facts, or undisclosed facts, are actionable. In other words, if an opinion is stated, then all the facts relied upon in deriving the "opinion" should be disclosed. This enables an individual to read the facts and then draw his or her own conclusion (i.e., opinion) which may differ from that of the writer or publisher. The decision as to whether a statement constitutes fact or opinion is a question of law for the court to decide.

The Supreme Court in *Milkovich v. Lorain* (1990) further narrowed the protection given to statements of opinion. As explained by the Court, merely prefacing a statement with "In my opinion, . . ." does not insulate an individual from defamation liability. More specifically, the Court stated,

Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications . . . p. 2706.

The Court established four factors to delineate between fact and opinion (based upon the United States Court of Appeals decision in *Ollman v. Evans*, 1984). The four factors, although none singularly dispositive, include:

1. The specific language used;
2. Whether the statement is verifiable;
3. The general context of the statement; and
4. The broader context in which the statement appeared.

These factors are critical when ascertaining whether a sport-related comment is categorized as "fact" or "opinion." Unfortunately, for the sport-related plaintiff, this four-factor analysis is of little help. The courts have granted great latitude to disparagers of sport figures. In addition, the four factor analysis is vague leading to interpretive dilemma. The following paragraphs elaborate the problems associated with this four factor analysis.

The Ohio Court of Appeals decision in *Stepien v. Franklin* (1988) illustrates the latitude

given to the first factor, the "specific language used." The *Stepien* court held an assortment of disparaging adjectives as constitutionally protected opinion. The adjectives included the following:

"Stupid," "dumb," "buffoon," "nincompoop," "scum," "a cancer," "an obscenity," "gutless liar," "unmitigated liar," "pathological liar," "egomaniac," "nuts," "crazy," "irrational," "suicidal," "lunatic," etc. (p. 1327)

As illustrated above, the specific language used by the defendant is overtly demeaning. However, the syllabus by the court (*Stepien v. Franklin*, 1988), justifying its action, stated, "The area of sports is a traditional haven for cajoling, invective, and hyperbole; . . ." (p. 1326).

Factor two, verification of a statement, also presents interpretive problems. The *Gertz* Supreme Court recognized that the First Amendment requires that we "protect some falsehood in order to protect speech that matters (1974, p. 341). As explained by the Supreme Court in *Philadelphia Newspapers, Inc. v. Hepps* (1986),

There will always be instances when the fact finding process will be unable to resolve conclusively whether the speech is true or false; . . . there will be some cases in which plaintiffs cannot meet their burden despite the fact that the speech is in fact false . . . where the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech.

Factors three and four, referring to the context in which the statement appeared, present additional biased inconsistencies. Society commonly accepts rowdy behavior as "part of the game." As explained by the supreme court of N. Carolina in *Toone v. Adams* (1964, p. 136),

For present day fans, a goodly part of the sport in a baseball game is goading and denouncing the umpire when they do not concur in his decisions, and most feel that, without one or more rhubarbs, they have not received their money.

The Supreme Court of Ohio (*Scott v. News-Herald*, 1986) concluded that most information conveyed in the sports section of a news-

paper is "constitutionally protected." According to this court (*Scott v. News-Herald*, 1986, p. 708), the sports page is "a traditional haven for cajoling, invective, and hyperbole." The *Scott* court's decision, although of limited precedential value, is precarious because it suggests that comments about a sport-related figure, regardless of the veracity or of the publisher's degree of fault, are constitutionally protected.

Part III: Defenses

Truth is an absolute defense to all claims of defamation. However, defendants are no longer required by courts to prove the accuracy of claims because the plaintiffs must prove falsity. Privilege, a second defense to defamation claims, provides defendants with the right to legally comment, although course and critical, about a person or entity. Privileged statements made without malice are immune from defamation liability (*Iacco v. Bohannon*, 1976; *Institute of Athletic Motivation v. Univ. of Ill.*, 1982). Two common types of privileges include the absolute and qualified privilege. "Absolute" privilege is enjoyed by those in: (a) a legislative forum (e.g., congressmen, congresswomen, senators, city council members), (b) the judicial forum (e.g., judges, lawyers, plaintiffs, defendants), and (c) administrative and executive branches of government (e.g., Presidents, mayors, department heads). Other individuals may enjoy a "qualified" privilege. As explained by Carpenter (1995, p. 55), qualified statements are those statements made: (a) without knowledge of falsity, (b) by a person with reason to communicate the statement, and (c) communicated only to a person with a "justifiable interest in knowing." Media defendants commonly use the "fair comment" doctrine as a privileged defense for potentially defamatory materials (*Sellers v. Time, Inc.*, 1969). Courts recognize the fair comment doctrine as a defense for those articles written about issues of public concern. The fair comment defense is only appropriate when comments are made without malice and statements are based on true facts (Black, 1990; *Cohen v. Cowles Publishing Co.*, 1954; *Conkwright v. Globe News Publishing Company*, 1965).

Failure to comply with the statute of limi-

tations is a third defense available to defendants. Although states vary, the majority of statutes stipulate a one-two year statute of limitations (Carpenter, 1995; Pember, 1990) which begins to run at the point when the plaintiff discovers the defamatory comment.

Neutral reportage is another defense available to media defendants in certain jurisdictions (Kaufman, 1989). Based upon the U.S. Court of Appeals (2nd Cir.) landmark decision in *Edwards v. National Audubon Society, et al.* (1977), media defendants can publish statements said by responsible or prominent organization even though the publisher doubts the veracity of the statements. As explained by the Court of Appeals (*Edwards*, 2nd Cir.1977),

When a responsible prominent organization . . . makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity. What is newsworthy about such accusations is that they were made . . .

The protection afforded by constitutional rights is another common defense. As discussed above, defendants have constitutional protection via the First Amendment and Fourteenth Amendment when commenting about public officials, public figures, or limited purpose public figures so long as the statements are not made maliciously.

Part IV: In Defense of the Media and Other "Publishers"

A number of reasons are used to justify the absence of legal protection given to a sport figure's individual reputation. Six reasons will be elaborated on in subsequent paragraphs.

First, as noted above, it is widely accepted that comments made by sport journalists are traditionally hyperbolic in nature or characterize "tabloid" reporting. In fact, the *Scott* court inferred that newspapers readers assume that the sport pages are "a traditional haven for cajoling, invective, and hyperbole" in comparison to other sections of the newspaper (i.e., a statement appearing under a "Law Correspondent" byline). Padwe (1989) echoes this sentiment.

As stated by Padwe, Senior Editor of Sports Illustrated,

. . . the media have not applied the same journalistic standards to the athletic field that are applied to politics, the military, business, science, and medicine, and every other major field, . . . p. 124

As Padwe (1989) explains, the media and local sport figures often have a familial relationship with hinders accurate, responsible reporting. Sport writers "are fans first and journalists second" (1996, p. 244).

Second, sport-figures (as do all public figures, see *Gertz*) have greater access to the media for rebuttal than do ordinary citizens. As stated by Pember (1990), approximately 31 states have retraction or "right of reply" statutes as a means of ensuring media access.

Third, it seems contradictory to sue the very people who have helped an individual's career the most. For example, coaches should not be sued for statements regarding a player nor should the media be sued for information contained in its publications. Coaches give players opportunities while refining skills. Similarly, the press covers noteworthy athletic endeavors that give an individual recognition and acclaim.

Fourth, sport-related figures tend to be familiar with the media coverage and public interest in sport. If the potential for negative media coverage is that disturbing, one can pursue alternative careers or hobbies.

Fifth, reputation resembles a company's goodwill. Goodwill, as defined in the *Dictionary of Finance and Investment Terms* (Downes and Goodman, 1987, p. 157), is "generally understood to represent the value of a well-respected business name." In 1989 Congress altered key accounting rules by discounting the value of a thrift entity's goodwill in an attempt to clean up the savings and loan debacle of the 1980s (Barrett, 1996). Although the Justice Department is being sued for in excess of \$10 billion, the argument can be made that reputation (like goodwill) is an intangible, nonquantifiable entity that deserves little protection (*U.S. v. Winstar*, 1996). This development neutralizes an athletes' complaints about media tarnished reputations.

Sixth, as both Wally Butts and Coach Bear

Bryant demonstrated, when media go to far in making unsubstantiated claims they can be sued successfully (*Curtis Publishing Co. v. Butts*, 1967).

Part V: In Defense of the Plaintiff - A Counter argument

The above section of this paper outlined 6 areas justifying the concept of privilege and the right to freedom of expression and the press. However, counter arguments defending the sport-plaintiff's rights can be presented for each of the above.

First, content within the sport sections of newspapers represents "news" as is content within the business section. Consequently, sport journalists do have a moral responsibility to fully investigate, and accurately report, stories as do other journalists.

Second, media access is illusory for two primary reasons. One, legal counsel often suggests that it is in the plaintiff's best long-term interest if he or she remain silent and refrain from commenting to the media. For example, a recent debacle within the University of Louisville's (UofL) athletic program is illustrative of this point. Larry Gay resigned as UofL's Assistant Basketball Coach in January, 1996. Gay attributes the controversy, in part, to the media. As explained by Gay (Koerner and Forde, 1996, p. B1),

After enduring months of public embarrassment based on misinformation and vicious scrutiny by the media, . . . I have been truly frustrated by my inability to respond publicly to the systematic media attempt to discredit me, . . . My superiors and lawyers for (UofL) and my personal counsel advised me to remain silent, and I respected their advice . . . Unfortunately, my silence allowed the media. . . to raise questions and unsubstantiated inferences about me and my job performance without the benefit of all relevant facts.

Similar to Gay's situation, other sport-related figures may find silence the only viable option.

Two, right of reply statutes and statutory retraction laws were legislated to acquiesce the defamed individual. Unfortunately, right of reply statutes have been held unconstitutional by

the Supreme Court. As explained by Chief Justice Burger in *Miami Herald Publishing Co. v. Tornillo* (1974, p. 258),

The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment.

Similar to the "right of reply" statutes, statutory retraction laws provide immunity if the publisher promptly retracts the libelous material in a place as conspicuous as the originally contested publication. As mentioned above, 31 states have some type of retraction law (Pember, 1990). However, the constitutionality of these have also been challenged and held in violation of the Fourteenth Amendment. As explained by the supreme court of Montana in *Madison v. Yunker* (1978, p.131),

We do not find that the "right" of a libeled individual to obtain a retraction . . . is in itself a remedy. Remedies for "injury of . . . character" are found in "courts of justice" which "shall be open to every person."

As noted above, an individual's ability to "access the media" appears to be rather superficial.

Third, sport-related figures undoubtedly benefit from, for example, their coaches and the media. However, benefits accruing to coaches and the media are often times as, or even more, significant. For example, media journalist often launch stellar careers by disclosing personal histories of blue chip athletes regardless of privacy issues. Media journalists also routinely receive desired "freebies" including food and a spectrum of merchandise ranging from briefcases to apparel (Padwe, 1996). Further, sports help sell newspapers. Referring to college sports, Padwe (1989, p. 124) explains,

Newspapers, magazines, and television, meanwhile, need college sports because coverage of those sports help sell a lot of publications, newscasts, and advertisements.

Similarly, coaches depend on athletes to build winning programs. Winning programs and

national championships, in turn, yield much acclaim for the particular coach. Consequently, to conclude that libel litigation is generated by greedy and "thankless" athletes is problematic.

Fourth, to suggest that athletes and other sport figures have a "choice" regarding whether to engage or pursue the sport-related activity is unconscionable. Athletes, coaches, and other sport-related figures typically make great financial, physical, and social investments in a particular sport endeavor. As a result of their efforts, many individuals reap large financial rewards unavailable to the individual through the pursuit of any other vocation or career.

Fifth, to argue that intangible assets have no economic value is clearly wrong. The legal value associated with trademarks, copyrights, and patents is longstanding. Even goodwill has historically been recognized as an intangible asset to which value can be attached (Horngren and Sundem, 1990). Reputation, similar to goodwill, should be given similar economic value.

Sixth, the *Curtis* (1967) case represents the minority. A review of case law clearly indicates that defendants win the majority of defamation claims brought by sport-related figures.

Part VI: Conclusion

The law of defamation has come under great scrutiny as judicial precedent strips away the rights of an allegedly defamed plaintiff. Many argue that defamation law is an anomaly to established tort law which has broadened the rights of the plaintiff. For example, the demise of the privity of contract concept in product liability law, contributory negligence, and governmental immunity favor injured plaintiffs. In contrast, constitutional privileges given to defendants in defamation cases tend to continually expand. For example, in the 1960s and 1970s the Supreme Court diminished the rights of the public official, public figure, and limited purpose public figure. As evidenced by case law, sport-related figures have a very difficult time recovering for any defamation claim.

Legislation has already begun to insulate employers from defamation liability when giving employee references. Georgia enacted the

first reference-checking statute in 1991 to legislate the concept of privilege (Leonard, 1995). As of May, 1996, 14 additional states have enacted legislation limiting the liability of those providing employee references (Leonard, 1996). Future court decisions and legislation will continue to clarify the balance between the individual right to protect one's goodwill and the privileged and protected freedom of speech. *Washington v. Smith* (1995) represents a unique outcome in comparison to earlier case law. In *Washington v. Smith*, the plaintiff-women's basketball coach at the University of Kansas sued publishers of preseason preview publications for defamation. Defendant's comments included a statement that the coach "usually finds a way to screw things up." The interesting caveat regarding this case is the decision by the U.S. district court (Dist. of Columbia) to overlook whether the plaintiff should be classified as either a public official, public figure, limited purpose public figure, or private figure. Rather, the court adopted the "public concern" test applied in the vacated Supreme Court decision of *Rosenblatt v. Baer* (1966) and held in favor of the defendant.

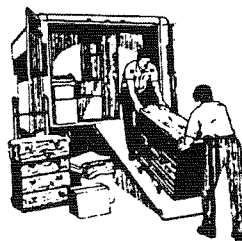
Regardless of the plaintiff's onerous burden of proof, insurance has become an increasingly attractive risk management method for individuals subject to being named as a defendant in a defamation claim (Schwartz, 1996). Employment practices liability insurance, or EPL insurance, covers areas including defamation, invasion of privacy, and sexual harassment. Historically, the availability of insurance for *intentional* torts was viewed to be against public policy. Further, it was feared that insurance availability would lead to an increase in intentional employment misconduct (Piskorski and Cirignani, 1995; Schwartz, 1996). The availability of EPL insurance, however, infers that reporting and commentary in the twenty-first century may be more lax and error-prone than it already is.

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