THE FIRST AMENDMENT IS FOR #MeToo

Courts Set Speech Protections for Defamation Lawsuits Related to the Social Movement

by Elizabeth Seidlin-Bernstein

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It is, by now, a familiar pattern: A woman accuses a man in a position of power—perhaps a public official, or a high-ranking business executive, or a celebrity—of sexual misconduct. The alleged perpetrator responds by denying the accusations and attacking his accuser's credibility. The news media reports on the controversy, and bystanders weigh in with their personal views about the allegations. Then someone files a defamation suit.

The #MeToo movement, which first gathered steam in late 2017 in response to the sexual abuse allegations of dozens of women against film producer Harvey Weinstein, has emboldened accusers and, in turn, led to a proliferation of defamation lawsuits. In some cases, it is the individual accused of sexual misconduct who asserts a claim—against his accuser for making the allegations, against the news media for reporting on them, or even against ordinary people for commenting on them. In other cases, it is the accuser who brings a defamation claim against her alleged perpetrator for calling her a liar, often after the statute of limitations on any civil or criminal action for the underlying misconduct has long passed. All of these scenarios implicate freedom of speech under the First Amendment.

As a result, many plaintiffs who hope to resolve accusations of sexual misconduct through defamation claims will be disappointed in the outcome. Because defamation is a speech-based tort, it is ill-suited to resolving the issue at the heart of any #MeToo dispute: What really happened between the accuser and the accused. For every defamation plaintiff who succeeds, like Bill Cosby's accusers who reportedly obtained monetary settlements in their lawsuits against the famous comedian, many more will find their claims dismissed at an early stage, without any opportunity for the vindication they sought.

Defamation began as an ordinary tort with roots in English common law, and thus every state developed its own unique body of law for the redress of harm to reputation caused by written or spoken statements. In 1964, the U.S. Supreme Court announced in *New York Times Co. v. Sullivan*[1] that defamation "must be measured by standards that satisfy the First Amendment." The unanimous Court recognized "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," and that the risk of a damages award under state defamation law could be even more chilling to speech than the fear of a criminal prosecution.

In recognition of the "breathing space" needed to protect freedom of expression, the Court has since articulated a number of constitutional limitations on state-law defamation claims, including the actual malice fault standard, the burden of proving falsity, and protection for opinion. These principles have the potential to safeguard all defendants—whether the accuser, the accused, the news media, or onlookers who expressed their personal views—in defamation suits arising from allegations of sexual misconduct. They also give reason for potential plaintiffs to be wary of using defamation as a means to litigate #MeToo disputes.

The Actual Malice Standard

In *Sullivan*, the Supreme Court created the first of its constitutional rules limiting the scope of defamation law: Public officials may not recover damages for defamation unless they prove with "convincing clarity" 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." The term "actual malice" is often misunderstood; it has nothing to do with ill will or malicious intent. Rather, "actual malice" turns on the defendant's subjective state of mind, focusing on whether the defendant knew the statement was false or actually entertained serious doubt about its truth. "In this respect, the phrase may be an unfortunate one," the Court acknowledged in its last major defamation decision, *Masson v. New Yorker Magazine, Inc.*[2] Even so, the actual malice standard has become an entrenched feature of modern defamation law.

Following *Sullivan*, the Court extended the actual malice fault requirement to plaintiffs who are public figures for all purposes, such as celebrities, and to limited-purpose public figures who have inserted themselves into a public controversy that is related to the defamatory statement. Private individuals, on the other hand, need only prove that the defendant acted with negligence (although they, too, must show actual malice to recover presumed or punitive damages).

Recognizing the benefit of the actual malice standard to public debate, New Jersey courts have further expanded its reach under state common law. In New Jersey, the actual

malice standard applies whenever the defamatory statement relates to a matter of public concern, even if the plaintiff is a private individual. Given the recent prominence of the #MeToo movement in public debate, the New Jersey rule offers an additional layer of protection to defendants in defamation cases arising from allegations of sexual misconduct, particularly to members of the news media. Yet not every allegation of sexual misconduct constitutes a matter of public concern under New Jersey law: In a 2012 decision, the state Supreme Court held that a man's sexual abuse allegations against his uncle were not a matter of public concern, where the accuser was not a member of the media and a jury had found in a prior lawsuit that the allegations were false.[3]

At any rate, the alleged perpetrators of sexual misconduct who sue for defamation are quite often public officials or public figures whose claims will be subject to the actual malice standard. Their accusers may also be treated as limited-purpose public figures because of their choice to speak publicly about their accusations, even if they have led otherwise private lives. For example, in *McKee v. Cosby*,[4] a defamation suit brought by one of the dozens of women who accused Bill Cosby of sexual assault, the U.S. Court of Appeals for the Third Circuit held that the plaintiff had "thrust herself to the forefront of" the controversy over the accusations "[b]y purposefully disclosing to the public her own rape accusation against Cosby via an interview with a reporter."[5]

When a defamation claim is brought against either the accuser or the accused, the actual malice standard is of limited use to the defendant because, in most instances, both the accuser and the accused are in a position to know for certain whether the allegations of sexual misconduct are true or false. In *Giuffre v. Dershowitz*,[6] for instance, the court held that the plaintiff, who accused Harvard Law professor Alan Dershowitz of forcing her to have sex with him, had adequately pleaded that Dershowitz's denials of the allegation were made with actual malice. Taking her allegation of sexual misconduct as true, the court explained, "it is a logical conclusion that a false denial of this charge was necessarily made with knowledge of falsity; Dershowitz could not have had sex with Giuffre and falsely denied that fact without knowing that what he was saying was untrue."[7]

The actual malice standard can play a powerful role, however, in cases against the news media arising from their reporting of #MeToo allegations and against third parties who express their personal views on such allegations. Because journalists and commentators typically have no firsthand knowledge of the alleged misconduct, they draw their conclusions about what occurred based on the information available to them. Demonstrating with convincing clarity that such defendants repeated allegations with actual malice is a heavy burden for defamation plaintiffs to meet. Indeed, federal courts are increasingly willing to throw out defamation suits at the motion to dismiss stage under the *Iqbal*/*Twombly* standard based on a failure to plead facts that would plausibly establish actual malice, as the Third Circuit did earlier this year in *McCafferty v. Newsweek Media Grp*.[8] A New Jersey trial court also recently dismissed a defamation suit brought by a bartender against a "whisper network" of women who posted warnings about his alleged sexual misconduct on social media, holding that his conclusory allegations of actual malice were insufficient.[9]

The Burden of Proving Falsity

The U.S. Supreme Court created another constitutional rule for defamation cases in its 1986 decision in *Philadelphia Newspapers,* Inc. *v. Hepps:*[10] At least in cases involving a public official, a public figure, the media, or a matter of public concern, the plaintiff must bear the burden of proving that the defamatory statement was false. *Hepps* thus invalidated state common law and defamation statutes purporting to place the burden of proving truth on the defendant. The Court acknowledged that its new rule would "insulate from liability some speech that is false, but unprovably so," but explained that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters."[11] The Court later clarified in *Masson* that a defamatory statement is only actionable if it is *materially* false; minor inaccuracies are not enough if the "gist" or "sting" of the statement is accurate.[12]

Placing the burden of proving falsity on the plaintiff dramatically alters the playing field in #MeToo defamation

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cases. When an accused perpetrator elects to file a defamation claim, he is signing up for the difficult task of proving a negative—that he did not engage in the alleged sexual misconduct. In this regard, a defamation lawsuit is nothing like a criminal proceeding, where the prosecution bears the burden of establishing the elements of a crime beyond a reasonable doubt. Likewise, an accuser who sues for defamation ultimately must establish that the underlying sexual misconduct actually took place, which would in turn establish that her alleged perpetrator's denials are false. In most cases, especially those involving allegations of sexual misconduct that took place years earlier, the question of truth or falsity will depend on a jury's assessment of the credibility of the accuser or the accused. To the extent there is uncertainty about what really happened, the constitutional rule announced in *Hepps* means that it should be resolved in favor of the defendant.

Statements that are simply not capable of being proven true or false are protected. Conclusions based on fully disclosed facts that are not both false and harmful to reputation are also protected. And statements of rhetorical hyperbole, which could not reasonably be understood as stating actual facts, are protected as well.

Protection for Opinion

In addition, the First Amendment absolutely protects expressions of opinion. As the U.S. Supreme Court explained in *Milkovich v. Lorain Journal Co.*,[13] while there is no "wholesale defamation exemption for anything that might be labeled 'opinion,'" certain categories of speech are insulated from defamation liability. Statements that are simply not capable of being proven true or false are protected. Conclusions based on fully disclosed facts that are not both false and harmful to reputation are also protected. And statements of rhetorical hyperbole, which could not reasonably be understood as stating actual facts, are protected as well.

Context is key in assessing whether a statement is opinion, and much depends on the identity of the speaker. Neither the accuser nor the alleged perpetrator in a #MeToo dispute can convert an accusation or denial into an opinion merely by tacking on the phrase "in my opinion," because the statement is fundamentally a factual one that can be proven true or false. Similarly, while an epithet like "liar" might in other situations constitute rhetorical hyperbole, a court is unlikely to view it that way in connection with an accused perpetrator's denial of wrongdoing. For example, in *Zervos v. Trump*,[14] a defamation suit brought by a former contestant on "The Apprentice" over President Donald Trump's denial of her allegations of sexual misconduct against him, a New York appellate court rejected the President's argument that his statements calling the plaintiff a liar were merely "fiery rhetoric" and "hyperbole," because he "used the term in connection with his specific denial of factual allegations against him, which was necessarily a statement by him of his knowledge of the purported facts."

By contrast, the opinion doctrine can protect even the accuser or the accused in situations where the facts supporting a conclusion are fully disclosed and not themselves actionable statements. Bill Cosby successfully invoked this argument in *Hill v. Cosby*,[15] in which the Third Circuit held that the implication in a demand letter from Cosby's counsel that one of Cosby's accusers was a liar was protected opinion. According to the Third Circuit, Cosby's lawyer had "adequately disclosed" the facts supporting the lawyer's conclusion (namely, that the alleged incident had taken place decades earlier, that the plaintiff did not file a contemporaneous law enforcement report or civil claim, and "[t]here has never been a shortage of lawyers willing to represent people with claims against rich, powerful men"), thus allowing the reader "to draw his or her own conclusions on the basis of an independent evaluation of the facts."[16]

Notably, a California appellate court reached the opposite conclusion about a similar demand letter from Cosby's lawyer in *Dickinson v. Cosby*,[17] holding that the implication that the plaintiff was a liar was not protected opinion because "the demand letter was authored by Cosby's attorney, who was speaking for Cosby, who, in turn, would certainly know whether or not he sexually assaulted Dickinson."[18] In other words, given the identity of the speaker, an agent for Cosby himself, a reader would reasonably assume that he had direct knowledge of the alleged rape.

The opinion doctrine also offers protection to third parties who may take sides in #MeToo controversies, because it is generally understood that they have no first-hand knowledge of the encounters at issue. In *Hill*, one of the state-

ments at issue was made by Cosby's wife, who said that the plaintiff and other accusers had "fabricated" their allegations against her husband. The Third Circuit held that this, too, was protected opinion, because "no reasonable recipient could find that [the] statement implied the existence of specific undisclosed facts known to" Cosby's wife about the accusations.[19] Outside of the #MeToo context, courts around the country have recognized that a statement expressing the belief, based on publicly available information, that a person has engaged in misconduct or even committed a crime is protected opinion. Otherwise, ordinary people would risk defamation liability whenever they posted on social media about sexual misconduct allegations in the news and public debate would be silenced.

These constitutional principles are not the only protections available to defendants in defamation cases arising from #MeToo allegations. Among other things, state-law privileges can provide significant relief, including the fair report privilege (which protects fair and accurate reports of official proceedings, such as criminal prosecutions) and the common interest privilege (which protects the sharing of concerns among a limited group of people, often in the employment context).

Prospective plaintiffs may want to think twice about bringing defamation claims for another reason as well: In doing so, they place their own reputation at issue, which in #MeToo cases can lead to invasive discovery over the plaintiff's sexual history or reputation for truthfulness.

For all of these reasons, defamation lawsuits tend to be awkward vehicles for litigating what is really at stake in #MeToo disputes, the underlying accusations sexual misconduct. Those who wish to speak out about the important issues raised by the #MeToo movement, from any perspective, can take comfort that the First Amendment will protect their right to do so. ⚖

Endnotes

1. 376 U.S. 254 (1964).
2. 501 U.S. 496 (1991).
3. *W.J.A. v. D.A.*, 210 N.J. 229 (2012).
4. 874 F.3d 54 (3d Cir. 2017).
5. *Id.* at 62.
6. 410 F.Supp.3d 564 (S.D.N.Y. 2019).
7. *Id.* at 577.
8. 955 F.3d 352 (3d Cir. 2020).
9. *Comyack v. Giannella*, 2020 N.J. Super. LEXIS 49 (Sup. Ct. Somerset Cty. Apr. 21, 2020).
10. 475 U.S. 767 (1986).
11. *Id.* at 778.
12. 501 U.S. at 524.
13. 497 U.S. 1 (1990).
14. 171 A.D.3d 110 (N.Y.App.Div. 2019).
15. 665 F. App'x 169 (3d Cir. 2016).
16. *Id.* at 171-172.
17. 17 Cal.App.5th 655 (2017).
18. *Id.* at 689.
19. 665 F. App'x at 174.